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CASE No.: 2001-ERA-21

DOUGLAS JONES,
Complainant,

v.

UNITED STATES ENRICHMENT
CORPORATION INCORPORATED,
Respondent.

Appearances:
John Frith Stewart, Esq.
Louisville, Kentucky
For the Complainant

Mark C. Withrow, Esq.
Paducah, Kentucky
and
David M. Thompson, Esq.
Paducah, Kentucky
For the Respondent

Before: THOMAS F. PHALEN, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER AND PRELIMINARY ORDER

This proceeding arises under the employee protection provisions of the Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851. The implementing regulations that govern this matter appear at 29 C.F.R. Part 24.1-9. Such provisions protect employees from discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part, and specifically for preventing employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of these statutes. The hearing, and this decision and order, are also governed by

those provisions, and the provisions of 29 C.F.R. Part 18.

On January 17, 2001, Mr. Jones filed a complaint of discrimination under Section 211 of the Energy Reorganization Act. The complaint was investigated and, on April 8, 2001, was found not to have merit. On May 4, 2001, Complainant, through counsel, requested a formal hearing in this case. Pursuant to an order of the undersigned dated July 11, 2001, the hearing in this case was held on October 23 and 24, 2001, in Paducah, Kentucky. (ALJX 1-2)[1] The parties were represented by counsel and were given an opportunity to present evidence and arguments, and to file briefs in the matter. Briefs and reply briefs were timely filed by the parties. After considering all of the documentary and testimonial evidence, and the arguments and briefs of the parties, the following is my recommended decision and order.

ISSUES

1. Whether respondent committed adverse action against complainant in response to protected activity under the ERA.

2. What damages and remedies, if any, the complainant is entitled to as a result of the actions taken by respondent.

FINDINGS OF FACT

Complainant, Douglas Jones, herein called "Mr. Jones," "Jones" or "Complainant," was hired in July of 1988 by The Lockheed Martin Utility Services (LMUS), the predecessor to the United States Enrichment Corporation, herein called, " the Respondent," "the Employer" or "USEC" at the Paducah Gaseous Diffusion Plant (PGDP) in Paducah, Kentucky.[2] He worked there continuously to his July 2000 lay-off at issue in this case. Prior to that time, he had worked as an air monitor for the Kentucky Division for Air Quality. This followed receipt of a Bachelor of Science degree (major: biology; minor: chemistry) at Murray State College in 1978, and his Kentucky teaching certificate.

At the Paducah Gaseous Diffusion Plant (PGDP), U235 isotope mined uranium is processed from 2% to 5% for use in nuclear reactors to produce energy. The mined uranium comes out of the ground as ore in an oxide form. As a first step in its processing, it is converted

[1]References to the exhibits of the Administrative Law Judge, and the Joint, Complainant and Respondent exhibits, and to the official transcript will be designated, "ALJX", "JX", "CX", "RX" and "T" with the exhibit or page number following the designation.

[2]In October of 1997, the company "Privatized" and USEC took over as a private, publicly held, company. The biggest change was the accountability and how it worked, which was formerly to the government and then being a company in business for itself, accountable to the shareholders. The biggest change was managing the budget to a private business, to maximize the company's value to the shareholders.

into a uranium hexaflouride gas (UF_6) at another location, and is transported to one of two locations where it is "enriched"; one at PGDP, the other at a similar USEC, Portsmouth, Ohio facility. From there, the enriched UF_6 is shipped in cylinders to a fuel fabricator where the metallic part of it, the enriched metallic uranium, is extracted and fabricated into fuel pellets in fuel rods for commercial reactors. The PGDP also receives some Russian uranium for blending redistribution for commercial reactor fuel.

This production process is governed by numerous health and safety regulations including those of the Nuclear Regulatory Commission (NRC) and the Occupational Health and Safety Commission (OSHA). Mr. Jones held various environmental, air monitoring and other positions at the PGDP of USEC until February 1985, when he was promoted to Support Services Department Manager in the Safety and Health Department, where they conducted environmental audits and internal audits in the plant to insure compliance with environmental safety and health rules and regulations.

Manager of the Training Department, Russell Starkey[3] testified that the uranium business was changing; that enrichment prices were down, and that market forces were flat in uranium demand for the foreseeable future. This resulted in a series of reductions-in-force (RIF), both voluntary (VRIF) and involuntary (IRIF), that either directly or indirectly affected Mr. Jones over his last three years of employment.

In 1998, Mr. Jones was transferred to the Independent Assessments Department, as the result of a statement that he made to Division of Safety and Health Manager, Steve Shell, that he wanted to avoid the first VRIF recently announced to the employees. While he initially did not request to go to there, he did so even though he was not qualified as a lead auditor. His new primary duties consisted of performing audits in the plant to insure compliance with the NRC rules and regulations. USEC as a "license holder" [a licensee] of the NRC, is required to maintain certain standards for license certification. He contributed to that certification process by reviewing the Safety Analysis Reports (SARs), and submitting the necessary applications and reports for activities there, to maintain that license.

Mr. Jones received overall satisfactory ("effective performance") evaluations on his 1996-1997, 1997-1998 and 1998 -1999 performance reviews.

When Mr. Jones learned that there would be another RIF in April 1999, he also found out that the person in charge of the Resource Conservation and Recovery Act (RCRA) training class, Bill Henderson, intended to take the VRIF leaving a possible open position in the training

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[3]Russ Starkey testified that he had a Physics degree from Miami of Ohio, with graduate work at the University of New Haven, Connecticut and North Carolina State toward an unfinished MBA. He also trained in the Navy Nuclear Power and Nuclear Weapons Programs, and started work at the USEC Gaseous Diffusion Plant in October of 1997, when it was under the control of Lockheed Martin Utility Services for the U.S. Government and the Department of Energy. Initially, he was hired as a general consultant to the General Manager, Steve Polston, performing on several projects, and then running the training department from April of 1998 to April of 1999.

division. On inquiry, his impression was that employees appeared to be "adequately" trained in safety matters, so he applied for the position.

Mr. Starkey became aware of Mr. Jones' interest in training when Jones made overtures to individuals in the department after the VRIF had been announced. Jones first interviewed for the training position with Danny Bucy, Group Manager in the Training division, who was in charge of training records. He also learned that, in addition to the RCRA program and process safety management, the position resulting from the vacancy would include training other employees in the mobile industrial equipment (MIE) program. He also determined that Ron Fowler[4] would be his supervisor, there.

Mr. Jones believed that the training would fit his skills, so he talked to Mr. Bucy[5], and Mr. Starkey about the program and his credentials. Jones had both Bachelor's and Master's degrees, a lot of environmental experience, having worked in the quality area, and a teaching certificate. With these and a scuba diving teaching certificate obtained as a hobby, he appeared qualified for a trainer position in the training program. He had also attended a 40 hour instructor training course in another area in 1988, and had received an on-the-job training development class in 1990. (RX 2) In addition, he attended a forklift training course at Shawnee approved by the Instructional Technologist, Don Gregory, after his transfer. These resulted in a waiver of any requirement for formal training as a trainer. (At that time, he could have gone into the training department but not as an instructor without the waiver.) However, his mutually agreed Performance Plan (RX 2) stated that he was to complete training enhancement plans and completion of the training procedure rewrite schedule.

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[4]Before his employment at USEC, Ron Fowler was a Nuclear Consultant from 1969 - 1991, beginning his employment there on December 9, 1991 as a Trainer in Health Physics (Radiological Protection). At the time of his deposition on August 23, 2001, he was Group Manager of Production Support and Compliance Training for OSHA, EPA and NRC regulations. He supervised the MIE/PIYT training program from 1997 or 1998 through the Winter of 2000, where he supervised Mr. Jones for four months from the end of 1999 through the end of the winter 2000. (JX 2)

[5]Mr. Bucy was employed at the Paducah Gaseous Difusion Plant in 1968 when it was operated for the U.S. Government by Union Carbide, and has been there ever since. He was a Technical Trainer before that, in which he developed training material for electricians, since he had previously had an electrical background. As Group Manager, he became the manager of the trainers about three years before the hearing, and was assigned the commitment tracking system for them. Mr. Bucy gave a deposition, which was admitted into evidence as a joint exhibit, in lieu of testimony at the hearing. (JX 1)

Mr. Jones testified that he did not know of the complexity of the MIE program, and had not been trained in, nor did he know how to operate any of, the MIE equipment in the plant.[6] However, he agreed to take the assignment anyway, and to teach it. His general instruction from Mr. Fowler was to work with Bill Henderson before his VRIF, for which Mr. Henderson was given a one month extension of his separation to train Jones on some of the equipment. He stated that he was told not to "perturb" Henderson or he would not cooperate before the VRIF.

The record is devoid of evidence that any of the existing conditions about both his general teaching qualifications or specific lack of mobile industrial equipment or powered industrial truck qualifications were somehow hidden from management. It is management that hired Mr. Jones into this position. It was first and foremost the responsibility of management to account for his success or lack of it in the new position. It is a basic principle of management that you may delegate authority, but you cannot delegate responsibility.

When Mr. Jones had a chance to observe Mr. Henderson teaching some of the courses, he got an "inkling" that there were problems in the program in that the "objectives" of the training were not being set forth. For instance, no one failed Henderson's classes; therefore, none would have to be "remediated." Jones concluded that training was inadequate; that it was marginal, and, in some cases, the "training modules" for heavy industrial equipment were out of compliance with the regulations.[7]

Mr. Henderson did provide hands-on training for Mr. Jones on the forklift, the overhead crane and the self propelled work platform and other pieces of equipment. Jones testified that they got into the crane and rode it back and forth for about 15 minutes, and Henderson gave him a card saying that he was certified in it. He also picked up an empty basket from the C600 crane, stopped it from swinging, and set it down, but did not lift with the C720 crane. Besides what they did with the cranes, operators also picked up heavy weights, moved them, and then put them down - which he did not do. While Jones testified that the training obligation under OSHA merely require that overhead cranes be operated by "designated people who are properly trained," he believed that they could not meet safety requirements with the training that he received, nor should they send people into the field with that sort of practice. This would apply not only to other types of Powered Industrial Trucks , or "PIT" trucks, including any type of motorized equipment used to lift, pull, stack or tier material, primarily forklifts , but also to cylinder haulers

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[6]Although this was an inaccurate statement regarding not being able to operate any of the MIE equipment, when he had received instruction in prior years on the operation of forklifts, and he had received some other instructor training in another area other than MIE, I find that these exposures were early in his career long before his transfer; that there is no evidence that he actually operated forklifts or any MIE to any extent; that this was not sufficient training for the operation of overhead cranes and the UF6 cylinder haulers, and that was certainly insufficient to train him as a "trainer" on all of this MIE equipment. While it did raise an issue on his credibility as a witness, it did not affect my final determination on the merits of the issues leading to his layoff that he was a credible witness .

[7]Mr. Jones testified that after Mr. Henderson had retired, Henderson and Jones had a meeting with Mr. Fowler, and Henderson stated that, "the program was in disarray and he said there's no way one person could fix that program by themselves..." (T 174) This remained undenied by management witnesses.

and industrial crane tow motors. (CX 16B) Jones complained to Mr. Bucy about Henderson, although he did not feel that Henderson falsified records.

Later, Mr. Jones showed Mr. Henderson a new OSHA regulation that was effective December 1, 1999, and asked if he was aware of it. Henderson said that he was, and showed him a letter from Mr. Shell, written by Industrial Hygiene and Safety employee, Georgetta Riddle, stating that the plant was essentially in compliance, except for a few things that were taken directly from the rules, such as the requirement that every three years, the operator had to be reevaluated. (On questioning Riddle, Jones found out that she had secured the information on the letter from Henderson anyway). Jones then filed an ATR[8] on May 13, 1999.

Mr. Jones' first written ATR (CX 26), stated that the retraining module did not comply with the new rule. It was also the first ATR involving PITs, and concerned the fact that OSHA had changed its regulations when Mr. Henderson was still in the Plant. The new regulations were to take effect on December 1, 1999, and Jones wanted a tracking mechanism implemented to get the PITs "OSHA-compliant" by that date. In response, Russ Starkey and Ron Fowler assigned him the task of revising the rule.[9] (This was a typical response of USEC to matters raised by Jones: Management's first response appeared to be to address the matter back to the complaining party to, as will be seen below, "fix it.") As an additional consideration, Jones was working for Fowler in August of 1999 when the ATR was filed, and he had informed Fowler of a concern that his own training had been in violation of a regulation governing trainers known as the T-DAG. Fowler acknowledged this fact and confirmed that he (Fowler) was not qualified to operate PITs - which would also have been a violation of the regulations.

Mr. Jones testified that one of the "road blocks" encountered by him at the start of his new appointment was that the "Training the Trainers" course was under revision, and that he did not receive it until it became available in March 2000, ten months later (and two months before he was rated for IRIF) , despite his requests to do so early in his transfer. (He confirmed that the March 2000 course was the first time it was offered after his 1999 transfer, which does not affect my evaluation of management's failure to either set up a program for him or to find one someplace else. Again, this was management's responsibility, and not that of Jones.)

This trainer training course was under what was called a Systems Approach to Training (SAT) procedure, which was for the more sophisticated nuclear sensitive types of training.

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[8]The ATR program, Mr. Starkey testified, is a corrective action program, in which problems in the plant are identified, formally documented, and subject to a procedural follow-through by developing action plans, completing them, and creating conditions so that the problems do not reoccur. Mr. Jones confirmed that Messrs. Starkey and Fowler never directly criticized him for filing ATRs, and, in fact on occasions, encouraged him to write them.

[9]Another ATR filed by Mr. Jones on December 9, 1999, (CX 26, No. 28) noted management's direction that he file it, which he confirmed in his testimony, and concerned, first, the fact that there was no plan approved for OSHA compliant forklifts or other PIT training modules, and second it concerned overhead crane problems. This was an ongoing issue that he originally identified and documented in ATRC 994940, his original one discussed above.

Covered in it were jobs that did not specifically include MIEs and powered industrial trucks, (PITs). (PITs, consisting of forklifts, mobile work platforms, cylinder haulers, etc., constituted a sub-category of the MIEs, while overhead cranes would be considered under the more general MIE classification.) A training course for MIEs would, therefore, be considered a "non-SAT" course.

When Jones was transferred, despite the fact that there may have been procedures available that were used in the non-SAT areas such as operating MIEs, I credit his testimony that there was no specific non-SAT training procedure or course available to train the trainers teaching non-SAT job training.

However, there is something that I do not understand: The USEC original Safety Analysis Report (SAR) was explained by Mr. Jones to be what USEC provided to the NRC on how it was going to insure public health and safety, and to comply with NRC rules and regulations. Section 6, page 6.6-1 through 14 of the SAR-PGDP was offered and admitted into evidence, requiring training programs and setting the standards for organization, supervision and review of programs governing the actions of USEC management officials first and foremost, and then Mr. Jones, who worked under their supervision. (JX 5) Section 6.6.3.1. thereof lists job positions/worker classifications that require certain training programs, and states: "On site transportation of UF_6 is covered by SAT-based training for tasks assigned to selected personnel within the programs listed in Section 6.6.3.1." However, not included in the list are workers who would be specifically classified as MIE/PIT operators. In spite of the fact that this was not explained at the hearing, I would have believed that any workers routinely assigned the task of on-site transportation of UF_6 would also be subject to the requirement that they would be covered by SAT based training. Since both parties in this case appear to have accepted the fact that MIE/PIT training was not governed by SAT-based training, I must accept that as fact, even though I do not understand it, and will act accordingly.

Also, since the UF_6 cylinders are moved by a class of MIE/PIT vehicles known as cylinder haulers, without stating what other such vehicles might have had the capability of handling such containers, or what other vehicles might have handled other radioactive materials, I would also have thought that all such operators should at least be prepared for the eventuality of such on site transportation, and would have been trained accordingly, using SAT procedures.

Again, these were not explained at the hearing, by either party, so I must make my own conclusions on the matter, but only to the extent that it may affect the outcome of the case. It does not but it lends strength to Jones' position that the MIE/PIT's should have been governed by the SAT procedures and the TRG.

Jones confirmed that Respondent did have SAT procedures available for other areas, and they were a little more complicated in that they deal with nuclear safety involved in the direct nuclear operations of the Plant. Despite that fact, and that such procedures could have been "looked at" by him anytime prior to the Spring 2000 resumption of the revised train the trainer course, and despite the additional fact that Respondent also maintained that there was a non-SAT training procedure available in that there were some individual non-SAT procedures utilized by USEC at the PGDP available to, or known by Mr. Jones,[10] I find that none of these were of timely or meaningful assistance to Jones in completing his initial MIE training modules. The reason is that there was insufficient evidence presented by Respondent that the procedures in existence were either effectively organized for use in the MIE program, or that those in existence were OSHA compliant for the training of MIE/PIT operators.

One of the important SAT requirements was for the mandatory formation of a training review group (TRG), made up of employees who either performed or supervised the actual work that would be covered by the training in a particular department, known as "Subject Matter Experts" (SMEs), and who would meet to specify details needed to be covered in a training course. This involved another "road block" encountered by Mr. Jones concerning a problem with Department Manager, Diane Snow because she did not want to form a TRG for PIT modules. Since Jones had not received any training in writing a training module, he consulted Instructional Technologist, Don Gregory, who trained trainers.[11] Gregory told him that the PIT training module should not be decided by the writer, but by a TRG consisting of a chair from the Industrial Hygiene and Safety group. This being an OSHA rule, the person in charge of which was Division Manager Shell, the Department Manager, Snow, would have been the Chair. Gregory suggested that Snow form a TRG, even though one was not ordinarily required for a non-SAT training module. Snow responded that she was not required to form such a group, and would not do so. She maintained that it was neither necessary nor helpful. However, Gregory testified that for Snow's group, a TRG was such an "option," and he also confirmed that a TRG "would maybe be best practice."[12] In the end, the module did not get written then, and Jones did not get disciplined at the time, although he was later accused of dragging his feet and taking a long time making progress. Upon further questioning, Jones confirmed that not setting up a TRG group

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[10]When asked by the undersigned whether it was not the case that all other procedures other than SAT procedures would be considered non-SAT procedures, Respondent's attorney stated that in the face of the statement that there were no non-SAT procedures, he would establish that there were some procedures in effect to help write a training module and present courses in the non-SAT area. That may be so in a general sense, but after hearing all of the evidence, I credit Mr. Jones' testimony that there were, in fact no designated non-SAT procedures in effect at the plant concerning the PIT/MEI modules that he had been directed to create. While somewhat of an ingenious theory, I find it disingenuous to conclude that a collection of possible procedures constituted a "non-SAT procedure." Therefore, I have concluded that no such procedure existed, and "that the only procedures available were all SAT related," as testified by Mr. Jones.

[11]Mr. Gregory worked at the plant for 27 years. There is no other background, educational or employment information on the record before his employment at USEC.

[12]In addition, Gregory verified Jones' OSHA research, but could not recall some of the details of the Bucy matters.

made his job harder, but did not make it impossible to proceed with the PIT module renovation. Later, a January 18, 2000 e-mail from Jones to Mr. Fowler, verified that Snow did help Jones form an action plan for it. (RX 2)[13]

By confirming that the lack of a TRG "made the job harder, but not impossible," to a question by the Respondent, I find that the answer was an uncontested verification of Jones' position that it was management that caused the delays in getting the training module completed. It is also my opinion that Snow's help on the "action plan" was too little, too late, in relation to the delay caused by her in not cooperating with the TRG suggestion at the outset.

It also appears that when Snow was later reassigned, a person amenable to TRGs, Group Manager Bucy, took over the program. A TRG was formed and progress was made on defining PITs and writing the the module. Jones testified that various communications with management verify this type of problem in completing the module, and the need for a new training program for it. (CX 3, 4 and 5)

In the end, the position of Mr. Jones on the necessity for a TRG was completely verified by the February 2000 discussion between Mr. Starkey and Mr. Jones when he finally told him that his first action should be to form a TRG.

At the end of 1999, an accident with the overhead crane resulted in an assignment to Mr. Jones involving the review and revision of the overhead crane training module. With help from Mr. Gregory, he formed a group and did the revisions. Gregory testified that they formed a task analysis group to define how to operate a crane and to perform rigging operations. He said that Jones and he "got along fine;" that "he was very attentive to it;" that "he worked well with him," and that "he took it and went with it."[14]

As the months went on, Mr. Jones stated that prior to February 2000, he would relate problems to both Mr. Fowler and to Mr. Starkey about the frustrations and roadblocks he was encountering in his attempt to get the MIE module and PIT module implemented. Fowler would say, "Good work. You have the opportunity to excel," or something like that, with "zero guidance." Starkey would say, "Your doing a good job discovering these problems. Now go and fix them." Finally, when he was practically begging for help on how to begin an action plan on the MIE, Jones testified that Starkey told him that his first action should be to form a TRG; then

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[13]Mr. Jones testified that the term "action plan" is "a list of sequential steps put together to solve some problem and reach some kind of end or conclusion "; that he was asked to prepare an action plan but could not recall specifically whether it was for revising the PIT training module or fixing the whole training program, that he was assigned the PIT training module in May 1999, and was expected to provide an action plan for it. He did know how to form an action plan, at that time.

[14]I was somewhat confused by some of Mr. Gregory's testimony. He appeared very definite on his own background and job, and quite satisfied about a number of activities when dealing directly with Mr. Jones. However, he became quite vague, and unable to recall specifics, when it came to verifying the problem areas between Jones, Snow and Bucy. For this reason, I do give his deposition testimony limited weight.

to review the procedure on mobile equipment and its licensing and certification procedure, and then said "to really review that procedure." Mr. Jones testified that he considered this repetitive guidance without specifics to be "inane," and he and Fowler "had a bit of a chuckle about such inane guidance."[15] I credit this testimony of Mr. Jones as a universal response of USEC management when he raised an issue.

In this vein, a confrontation arose over employees of a subcontractor not being properly trained in self-propelled work platforms because neither their training, nor the overhead crane procedures, met a new revised OSHA procedure. (CX 6) Mr. Starkey responded to Mr. Jones' e-mail on the subject, advising him to: "Keep on looking. It appears you have a marvelous opportunity to excel!!!!!!!!!" Jones testified that this "opportunity" for him to "excel," was without giving him guidance to do so, and with the number of exclamation points after the comment noted by him, Jones obviously considered this to be a somewhat sarcastic, and less than serious, reply. (CX 6) Again, I credit this testimony and his reaction to it as legitimate.

Mr. Fowler finally agreed to the purchase of training videos on the matter, for which Jones requested a review by Georgetta Riddle, the OSHA expert on Diane Snow's staff. Riddle first indicated that she would go with his view, and then, on again asking her to review it, she exploded, stating: "I don't give an ...(explitive). " However, she finally did review the videos, after they came in.

As a result of the above, and his lack of progress in fixing it, Mr. Jones decided on his own that he would do better if he moved into a different job in training in environmental compliance, and sent a memo on January 10, 2000, to Mr. Fowler (CX 8) requesting that he be removed from the mobile industrial equipment program module. In it, he recounted his own lack of training on creating modules for MIE training, and on the unhelpful responses from Mr. Starkey. (CX 8) He thought it would run more smoothly if someone else ran it; that it was affecting, not only his work, but his morale; that he did not enjoy going to work as he had previously, and that, while he did not think that they intentionally impeded it, that, at one time, he had been instructed by Mr. Bucy to take the administrative pieces on the OSHA guidance and "use that as a module," which was prohibited in the regulation. (Bucy later confirmed in his deposition, that "personalizing" the OSHA regulation to the plant, such as Jones wanted to do, was the appropriate way to do the PIT training module.)

[15]"Inane" - "without sense or substance." (Webster's II, New Revised University Dictionary.) As applied to the subject that Mr. Jones had raised, I agree that the reply was "inane." At the very least, it is an indication that his legitimate e-mail on the lack of regulatory compliance of the overhead crane modules with the OSHA regulations was not being taken seriously.

Starkey testified that he said no to Mr. Jones' transfer request, since he did not have a place to put him, and he had been brought explicitly into the training department to do what he had been assigned to do. Jones testified that he remained in the program at that time; that he was essentially forcibly removed from the program later on, and that he had said that the forcible removal would not do his career any good.

On February 3, 2000, Mr. Starkey met with Messrs. Bucy, Fowler and Jones, and told Jones his progress was inadequate since he did not have an action plan in two months; that he had not met the schedules, and that he was moving the leadership from Fowler to Bucy "to change one of the variables that he was trying to assess," to get Jones adequate direction and leadership, and to get the MIE program more closely aligned with maintenance activities than it was. Starkey pointed out that he had rated both Jones and Fowler below expectations in the MIE program area, in his "midcycle review," since it was not clear to him that Fowler was giving Jones "adequate direction." However, he attributed 80% to Jones and 20% to Fowler for the failure to complete a module. Starkey testified that while Jones had raised his lack of training and experience to him, Jones did not assume personal responsibility for them, so he remained unhappy with him. I discredit Starkey on this allocation of blame, since he acknowledges knowledge of Jones' lack of experience and training; gives him the higher percentage for the problem, with 20 % to Fowler, and allots none of the cause/effect percentage to himself.

Mr. Starkey's testimony regarding his unhappiness with Jones ultimately begged the question of the extent to which his lack of training and experience involved severe safety matters that were being legitimately raised by Jones, and not resolved by either Fowler, Bucy or even Starkey himself, which I find substantially contributed to the real cause of the lack of success of the program. Starkey's allocation of blame turns the managerial obligation on its head, when both the selection of Jones and the failure to get him safely and adequately trained lay squarely on the shoulders of management.

On that same day, Mr. Jones addressed an e-mail to Messrs. Bucy, Starkey and Fowler over confusion about his supervision by Fowler being transferred to Bucy. (CX 27) Later that day, a handwritten note by Department Manager Ron Wetherell appears on the February 3rd e-mail from Mr. Jones addressing continuation with Fowler on all issues except MIE, for which he would report to Bucy; that this would be for a few weeks until another person could be transferred into the MIE position; that thereafter, Jones would continue to work for Fowler; that Jones was not happy about this; that Jones had requested the reassignment and that it was denied and that Wetherell had not been able to act upon it then. (CX 27) It also confirms a meeting with Jones, Bucy and Fowler, with Starkey not mentioned.

Mr. Wetherell's note then characterized Jones' responses at the meeting as having offered a lot of excuses about problems in the program and not being able to generate a training module for the mobile industrial equipment program for over two months, without stating what they were, or examining or evaluating them. Wetherell stated that he had seen no attempt by Jones to learn what he needed to learn to do so; that there was no excuse for not being able to write a

training module with literally thousands of modules available to model one on; that, again, he had seen "no movement" on it, and that Jones had said that he agreed with what was being said. (CX 27) He then directed Fowler and Jones to develop a performance plan for Jones, together, and told them that he wanted it, "very detailed." At the end of the meeting, when asked for comments, Wetherell wrote that Jones stated, "I have nothing constructive to offer." Wetherell confirmed that when Jones stated a concern that this would hurt his career, Wetherall told him that it already had. (CX 27, p. 3)

At this point, I find it hard to reconcile the fact that Jones, by Wetherell's own wording, had "offered a lot of excuses," yet that there was no evaluation of the points that Jones had raised, and he simply concluded that there was no excuse for Jones not being able to write a training module in two months. Of course, Jones had nothing further of a constructive nature to offer. What he said about his own lack of experience and training in doing so, and the points that he had raised about getting the job done, had been rejected as mere "excuses." Wetherell totally failed to perceive the managerial/ supervision problem in all of this.

Reasons set forth by Mr. Jones as a basis for his request to reassign him as stated in his January 10, 2000, letter were then repeated by him in his own January 12, 2000, Employee Mid-Year Progress Assessment form (CX 9), and were then used negatively by Fowler in his February 7, 2000 evaluation. On the January 12th form, Jones noted that his request to have the MIE program transferred was denied, and that he had remained performing the duties previously described, without the necessary training and expertise that he had raised. Mr. Starkey testified that Jones never requested training on MIE modules. In the Progress Assessment form Jones specifically stated: "[N]eed training as instructor/developer to effectively correct problems in mobile industrial equipment program." (CX 9) I find that Jones did request training.

In Mr. Jones' February 7, 2000 evaluation by Ron Fowler, his signature withdrawal of which appears as a strikeout therein, that should be dated February 8, 2000, (CX 10)[16] he received an "M" (Meets Expectations) for taking on a challenging program, with numerous areas to excel. However, Fowler stated that he was having difficulty with the "large program" (the MIE program), but that he was "trying," and did a "thorough and accurate job when ... looking up information and regulations." Other comments noted deadlines met; stated that he "communicates well", and found his "integrity and honesty" to be "never in question." It also complimented the fact that "he admits his areas of weakness and strives to overcome them with his new responsibilities," and stated that "more time is reqd (sic) to overcome weak areas." However, Fowler gave Jones a "B" (Below Expectations), noting that he had been "working towards the correction of a problem he inherited .... but is needing help." (CX 10)

[16]Not January 12, 1999, February 7, 1999 or February 8, 1999, as incorrectly stated in the transcript. (T 98)

Mr. Jones did not agree with the "B" rating in relation to what had been previously stated and told that to Fowler. A "post-it" note from Fowler attached to the evaluation, confirms what Jones said at the bottom of the evaluation, where Jones drew a line through his signature, added the date: "2/8/00" and wrote, "I don't agree with assessment & am going to meet with Employee Concerns to resolve this issue." He then signed "Douglas Jones 2-8-00" (CX 10) At the hearing, I acknowledged that the inconsistency within the "B" description, in which Fowler appears to recognize the blame for the problem as a company problem, which Jones "inherited."

When the February 7th evaluation was received by Mr. Jones, he was told by Ron Fowler in an e-mail that he was to submit to him "a plan for his new non-mobile duties." In forwarding Fowler's e-mail to Ron Wetherell, Jones stated that it was not a plan required whenever a "B" has been received but was merely to establish his new duties, and repeating his responses and objections to the evaluation, after which it "would be reevaluated by all those involved." (CX 16)

The resulting unsigned draft memorandum of February 8, 2000 from Mr. Jones to Mr. Fowler (CX 24-4) was discussed by them as a possible plan, but was not formally submitted. It specified improvement of various training programs due to his change of job duties, including Resource Conservation Recovery Act (RCRA) training, respirator training, process safety management and other training including that which had been discussed with Fowler in a memorandum from Jones to Wetherell dated February 9, 2000. (CX 24-3)[17] In response, he stated that he had already drafted a plan, which was the above February 8, 2000 unsigned, unsubmitted memorandum (CX 24-4) but that he was not going to agree to Bucy's plan because of its vagueness, the conflicting information being received, and the fact that it was not an official performance plan. (CX 24-3)[18]

As will be seen, the significance of the February 8, 2000 draft plan, which was neither formally submitted nor adopted, was that it emphasized management's own disarray in the treatment of both Jones and the entire MIE program. It is my opinion that throughout February through April 2000, Fowler, Bucy and Starkey were unable to agree on what the Plan should be; that they were unable to deal with Jones on the matter with what he had been raising in terms of the safety issues that he had

[17]This followed a conversation with Bucy in which Jones discussed his understanding with Starkey that he had directed Fowler to insure that he and Jones completed performance plan discussed above. Bucy told Jones that he had discussed it with his staff, which Jones questioned as contrary to what Fowler had told him, since the "performance improvement plan and commitment" (PIPC) was not supposed have been an "official" PIPC , but rather was being used to give him a plan on the suggested changes.

[18]Although I stated at the hearing that I would only give limited value or weight to this document due to its lack of completion, (CX 24-4) I do take note that it was used or referenced in its incomplete form in the discussions with Mr. Wetherell as a basis for what they talked about, rather than for the fact of what they ultimately agreed to do or not to do, and is given some weight due to that fact alone.

presented, and that they welcomed the "out" that was provided for them by the layoff. They seized upon by it in the May IRIF evaluation, even though, by May, Jones had virtually completed the training module.

A February 9, 2000 meeting between Messrs. Starkey, Fowler, Bucy and Jones resulted from a request of Jones due to the receipt of conflicting information on his reporting obligations, as documented in the e-mail, reflecting Mr. Wetherell's handwritten notes of February 3rd. When told by Starkey that the program would be removed from Fowler and given to Bucy, he then said Jones would be in it for a couple of weeks, then it would be assigned to someone else in the plant. Otherwise, the direction from the meeting never occurred. Jones remained in the program, and he continued to report to Bucy. In response to a question from the undersigned about whether he had ever had a follow-up conversation to that of February 9th about the move and its effect on his career, he stated not that he could recall, and that he did feel that it had damaged his career because he did not get the program corrected as management desired.

Following the transfer of the program to Mr. Bucy from Mr. Fowler, Mr. Jones testified that Bucy was not pleased about it. Jones told Bucy that he had found an OSHA website "guidance" on how to devise a compliant PIT module. Bucy went to the website, printed the guidance and told Jones to print the front five or six pages and use them for the PIT modules. Jones had seen the OSHA guidance and stated that he could not use it as a substitute for a PIT module because it must be specific to his own plant, "as the one I eventually created was." Jones resisted this, and felt that Bucy took it as an act of insubordination. Bucy, "became very angry" for not doing it, which resulted in a "loud argument" right outside his office, which was witnessed by several others. Mr. Jones stated that he then broke off the argument, and went to Instructional Technologist Gregory, since Bucy was his supervisor, and told him that he did not think that Bucy knew what he was talking about. There is no evidence of any other such argument or explosion between Jones and any of the supervisors involved in this matter, and I saw no evidence that it had been reduced to writing as any sort of a personnel action.

Mr. Bucy, however, was angry, both at Jones and at having been given another task to do. He hung a sarcastic note on his door, stating: "Danny Bucy in charge of maintenance training, mobile industrial equipment, training equipment ..." and then a blank to fill in. Bucy, Jones testified, then became "aloof" toward him, and gave him the impression that he did not want him "in or around his office..." After that, Jones saw no benefit in asking questions or for guidance from him. Thereafter, Bucy appeared "cool" (not "cruel" as incorrectly reported in the transcript. T 234 - 235) toward Jones, rating him lower for the layoff, even though there had been no reprimand or other adverse action at the time of the incident. Bucy testified in his deposition that he did not like the fact that a program that was operating normally was given to Fowler and Jones, and then went into PITs; that no one was getting trained, and that it was then turned over to him to "fix." Notwithstanding Bucy's reaction, Jones stated that he proceeded at that time to finish what he was doing the lawful way.

Mr. Jones filed an employee concern over the evaluation on February 9, 2000, repeating his objections to the "B," and restating his MIE assignment and lack of MIE training. (CX 11) He testified that it was Mr. Bucy who advised him to do so, and verified that on the Employee Concern Intake Statement, he also wrote: "If we don't put an adequate mobile industrial equipment training program in place, our employees' safety is at risk." (T 101-102) The document shows that he did so, checking "Yes" where it asked whether a safety issue was involved. (CX 11) This was clearly protected activity.

Mr. Bucy confirmed in his deposition that when called by Employee Concerns over Jones' "B" rating on the evaluation, that he told the investigator that he did not feel that Jones had received the proper instructions because he never knew how to do anything as far as work in the other areas he was working in. (*i.e.* In other words, the MIE/PITs.) He stated that Jones did not know the forms to use, and that he did not feel that he got the proper instructions for developing PIT modules. This statement did not appear in the results of the Employee Concern investigation as later reported by Mr. Wetherell. (JX 1, Bucy depo. p. 28)

In a memo of 3/15/00 from Mr. Jones to Mr. Wetherell, which set forth who he would report to (Bucy), Jones testified that Mr. Starkey had said that Ron Fowler "could have provided ... better guidance as a manager to fix the mobile industrial equipment program." (T 107) Jones repeated what he had previously told Wetherell, and had stated in his Progress Assessment (CX 9), that at no time during the period covered by the evaluation was his performance called into question, and there was no documentation to that effect. (CX 23, Item #1) He also repeated that: (2) he had accepted the MIE duties not knowing the complexities of the program or the depth of expertise that would be required to correct them; (3) he had approached management on these and was merely told to "fix the program"; (4) he had been freely admitting his shortcomings with the program, and was told to form a TRG (Training Resource Group); (5) the program owner was not in favor of a TRG, and was not required to do so; (6) he was "waived" for the requirements of instructor/ developer, yet required to do those duties; (7) when he approached an Instructional Technologist (Trainer's trainer) for assistance, he was told that the content of programs should be defined by the TRG; (8) having him develop the MIE program, or anyone presently employed in training, was a violation of a specific OSHA regulation, and (9) summarizing, he was told to "fix" the program without the proper tools and guidance. (CX 23)

However, in a full responsive memorandum from Mr. Wetherell to Mr. Jones on April 4, 2000 regarding investigation of both his evaluation and related employee concern, (CX 25) Wetherell referred to their February 9, 2000 meeting on the evaluation, the transfer of Jones to the Training Organization in April 1999, and Jones' assumption of the MIE program in July 1999. He repeated that Jones had cited his lack of MIE experience and insufficient guidance and their not sending him to the Training Developer class as resulting in his "B" rating in the "Other" evaluation category involving job knowledge, initiative and interpersonal skills criteria. The concern had been referred to Bill Thompson in Human Relations (HR) to consider the "B" rating, and Messrs. Fowler, Bucy and Starkey were interviewed. It was the opinion of HR that even though he did not attend the writing/developer training module he, "did not demonstrate the initiative expected from an employee" in his labor grade. The report faulted Jones for taking over

two months to create an action plan, that resulted in having to obtain an ATR extension. It stated that other procedures and training modules were referred to for his use but not utilized, thus impacting this adverse view of his initiative. Consequently, HR did not recommend any change to his mid year appraisal. Wetherell agreed, after interviewing Starkey and citing Jones' college degree, teaching certificate and availability of training modules to use as models. Of interest is the fact that while Starkey agreed with HR's conclusions, he did feel that Fowler could have provided better management direction. In closing, Wetherell recommended that Jones work "diligently" on his PIPC during the balance of the year to eliminate his "B" rating, and that he utilize the employee concerns program in the future, even though he was not successful in its current use. (CX 25) Wetherell did not mention Bucy's view of the lack of training and preparedness of Jones for the PITs assignment, or the reasons that Jones had raised, branded by him as "excuses" without further evaluation.

However, Mr. Jones testified to a March 30, 2000 document addressed to Mr. Wetherell from HR's Bill Weber, to whom the employee concern of Mr. Jones was referred by Mr. Thompson. It purportedly stated, with Jones confirming his attorney's reading of portions of the document into the record without substantive objection, that "Jones was trained by his predecessor, but the magnitude of the problems with inadequate MIE training modules was unknown to Jones and not communicated to Jones by his predecessor. (T 127-128)[19] The document then goes on to state that, "Jones was given two months to create an action plan but did not do so," without evaluating the effects of the prior statement.

Another memorandum involving the Employee Concerns program was addressed to Mr. Starkey by Mr. Wetherell on May 16, 2000. It enclosed a questionnaire concerning the program in which Mr. Jones had criticized the program earlier that week. (CX 24) In it, Jones disagreed that the program had helped him and strongly disagreed that he would use it again; writing, in part: "I was encouraged by one manager (Bucy) to file this concern 'against' the other two managers" and, "when I was given the results was told that the manager who encouraged me to file the concern, supported the position of the other two managers." He was then assigned to report to the first manager who made the recommendation to file (Bucy, again), and stated that he "completely shuns me. - acts like he doesn't want me in his office." (CX 24, p. 2) Wetherell directed Starkey that whether true or a misperception, "either situation should be corrected." Starkey was directed to investigate it and to take the appropriate corrective action, advising him of his action in writing. (CX 24, p. 1)

[19]The document does not appear as a numbered exhibit. However, the uncontradicted quotes from it drew no objections from the Respondent's attorney and he later confirmed the document's inclusion in a package provided to Complainant's attorney prior to the hearing. The quotes are, therefore, accepted as presented into evidence, and given the appropriate weight.

The last of this series of memoranda was sent by Mr. Wetherell to Mr. Jones on June 15, 2000. (CX 24-2) It recounted correspondence from Starkey of June 9, 2000, in response to his May 16, 2000 memo to Starkey, and an e-mail from Jones of June 1, 2000, about the concerns meeting with Wetherell. This resulted in a June 12th meeting between Mr. Weber of HR, Wetherell and Jones, regarding the belief that Bucy had set Jones up, inducing him to file the employee concern. Wetherell defended Bucy, stating that it was management's responsibility to inform employees of their options. Jones stated that he still felt misled, and that he would not have filed if Bucy had simply told him that he was wrong. Otherwise, while Jones stated that he felt that he was receiving necessary direction and attention, he still objected to management's view that he should have been able to develop MIE training modules on the PITs in the time prescribed. In conclusion, Wetherell repeated that based on Weber's (HR's) review, he could not change his evaluation. (CX 24-2) Again, I find that the chinks in this armor of contradiction, and self-protective back-peddling, are significant. There seems to be acknowledgment of the lack of training, which would have had to involve facial OSHA violations, and a refusal to place the responsibility for the failures in the program where they belonged - at the top. In addition, it is my opinion that Bucy should have warned Jones that, while he was encouraging him to file a concern, he did not agree with Jones' position on it.

I do not give much weight to the HR report's conclusions as objective. It is my opinion that the HR Committee did not properly evaluate the alerts that were being provided by Mr. Jones on the condition of the MIE training program, and the lack of training and safety and health conditions that were being raised by him. They merely mimicked the opinions of management while overlooking the failure of management to properly assess its role in the failure to have a timely training module, and then blamed their oversights on Jones. The only people that HR talked to were Messrs. Fowler, Bucy and Starkey, and not Jones. The "investigation," if any, involved circular reasoning, relying on the very people who gave the rating in the first place. The result could only have been the same on the "B" rating, which I find to have been unwarranted, and based upon the prior statements in the evaluation.

With regard to there being hundreds of training modules available to utilize as examples, as stated by Mr. Wetherell in his February 3rd handwritten note on the e-mail from Mr. Jones to Messrs. Bucy, Starkey and Fowler, Jones testified that there were training procedures that showed one how to develop a training module, but they applied to SAT based training (Systematic Approach to Training) and not to non-SAT based training, which is what they were doing with the MIE/PIT training, and which is so stated right in the procedure. As a directive on what to do, Mr. Gregory had simply told Jones to form a TRG, which is an approach of the SAT procedures, not a task or job analysis needed in these particular matters concerning PITs. Using the UF_6 cylindar haulers as an example, Jones testified without contradiction, that they hauled cylinders of uranium hexafloride (UF_6) with them, and that one could be dropped, broken and cause release of UF_6, causing it to be inhaled, with an immense safety concern. He compared the suggestions being given to him on creating a written module by referencing hundreds of modules training available to utilize as examples, to flying a plane, giving the flight manual to the pilot trainee, and telling him to go fly the plane using the documents, and not having been actually

trained on the equipment.

Mr. Jones testified that he followed the program written by Mr. Fowler as agreed to by him on March 15th as a "program" but not a PIPC. This resulted in his being assigned to Mr. Bucy to work on the development of MIE module "full time," meaning six months or longer, spending 100% of his time on it. Jones testified that while this was a satisfactory solution to the problem at the time, since it was around the time that he had received his MIE training, in fact he also continued to provide training in environmental compliance (RCRA) as there was no one else to provide it.

Simply because it was questioned by management witnesses, I find that Mr. Jones was subjected to pressure to complete a training module as well as an action plan, and that this did not cure the factors that contributed to the timeliness problem which was created by management.

Mr. Jones testified that notwithstanding all of the problems encountered, he did complete the MIE mobile program module, (The Plan) as shown in the Training Module Approval Sheets on April 5th. It was approved through the above review process, and went into effect on May 18th. (CX 16B) Complainant's Exhibit 16B contains the actual module, and 16A contains the overhead projections used in classroom training, presenting the module. Both CX 16A and CX 16B, submitted by the Complainant are the same duplicates of the Training Module Approval Sheet form, with the effective date of "5-18-00" and signed by Mr Jones on "4-5-00".[20] Complainant's Exhibit 16A contains the handouts on the industrial hygiene and safety procedure for PITS, and then the actual OSHA regulation itself for PITS. Mr. Jones actually did "put on" training sessions utilizing these procedures, forms, handouts and slides.

USEC trainees who participated in the training modules run by Mr. Jones filled out evaluation forms concerning his training, rating him from "NI", needs improvement "S" for satisfactory, "G" for good and "E" for excellent, and these ratings were given computer numbers 1 - 5 to do so. In addition, "N/A" meaning "not applicable," was marked on a number of forms and scored as a zero ("0"), and was entered into the computer that way. Forty-nine completed evaluations about Jones' training sessions were submitted by USEC to him a few days before the hearing. On those, of numerous ratings in various categories, he received only two NI's, one on each of two of the forty-nine separate forms, and both of which contained all other G's and E's. Mr. Gregory wrote on the form that he had scored better than that by all other applicants and saw no other problems with the issue. While Jones found it necessary to explain the totaling or averages that appeared to be a lower average when the N/A's and zeroes were calculated, I asked for confirmation that there were a number of S's but the high preponderance of ratings seem to be in the G and E columns, which he confirmed, and was not contradicted. (T 147) There was no

[20]Review and approvals of the module appear throughout by Messrs. Riddle, Booker, Bucy, Potter, Reed, Perry (#2) and Booker (#2) on the dates of April 7, 13, 17, 27, and 10, 2000, May 3, 2000, April 27, and April 13, respectively.) A later Training Module Approval Sheet submitted by Mr. Craven on June 16, 2000, and reviewed and approved by others thereafter in a manner similar to Mr. Jones, there were specific references to the nuclear safety and handling requirements and training specific to the site. (CX 17)

contradiction to this summary and I so find.

Summarizing the ATR's filed by Mr. Jones, between May 13, 1999 and May 8, 2000, eleven ATR's are recorded as having been filed concerning operation and training of USEC employees and employees of USEC subcontractors on industrial mobile equipment at USEC. These included applicable OSHA regulations governing training and operation of powered industrial trucks, forklifts, self propelled work platforms and overhead cranes and other such equipment near "energized areas" of USEC. Three of the ATRs are the same one, but are recorded as having been assigned and resolved by three different managerial groups. (CX 26) Seven filings, including the one that was resolved by three managers, were filed before Mr. Jones requested an assignment change on January 10, 2000, (CX 8) and two were filed after that date. All specified one or more of the above violations of OSHA Regulations, and all had to be corrected, except one OSHA regulation which was determined to have been revised and did not require the action requested by Mr. Jones. (See, CX 26, pp. 236, Item # 27)[21] For instance, in one ATR of 12/9/99, explaining the explicit OSHA regulation shortcomings stated therein, referring to the ATR Summary he testified that he had been providing instruction in the mobile industrial equipment program and was licensed to operate a forklift and overhead crane and self propelled work platform, but was never enrolled in the program through health services as required by Section 6.1.1 of CP2TRQP 1030. (CX 26, p. 237/ Bates Page 984) There is no question about the legitimacy of these ATRs or the fact that they constituted protected activity, known to USEC.

One ATR involved powered industrial trucks (PITs). Mr. Jones was responsible for upgrading the module, with first, one deadline, then a subsequent one, and later a compliance deadline. Mr. Starkey asked him to file an additional ATR on it, to get the action plan and corrective process scheduled and resolved. Jones determined that there had been a desire at USEC to upgrade the MIE program and equipment for years, as demonstrated in a prior ATR discussed by Starkey. However, he testified without contradiction that from the time Jones arrived in the department in April 1999 to August 1999, Mr. Henderson advised against finding those problems and fixing them. When Henderson left in August, however, Jones was actually assigned the task of revising the MIE/PIT module. During that same time period, he testified that it was not as though he was sitting idle; he was performing training, and was in contact with Industrial Hygiene and Safety and the internet looking for examples and module packages that he could buy, and, as above stated, he did submit other draft modules.

The Layoff :

Mr. Jones testified that he first learned that he would be subject to an involuntary reduction in force (IRIF) on July 5, 2000, although the rest of the plant was informed that there would be an IRIF on June 27th or 28th, and he was off from work. He said that Mr. Fowler called

[21]I find that these ATR's all involved written reports by Mr. Jones concerning the safety and health of both the employees of USEC, and ultimately of the public, and constituted protected activity under the provisions of the ERA.

and told him to report to Mr. Starkey's office, where he was told by Starkey that he was "being IRIF'd." When Jones asked if it was due to his performance, Starkey said, "No." Jones then went to Fowler's office, told him of the action, gathered his belongings and left in Fowler's truck when he offered a ride to the gate.

Regarding the cause of the layoff, Mr. Starkey testified that meetings with senior managers resulted in the need for additional, significant reductions in costs. Thirty percent would be in personnel, with a number being allocated to both the Portsmouth and the Paducah plants, including two to the training department at Paducah consisting of one trainer and one non-exempt employee. Either Mr. Starkey's secretary or a records clerk had to be one to go from the non-exempt area, and one in the production support training area, which encompassed MIE. Since they expected the demand for such training would drop in a year or two to one half of a full time employee, that became the choice.

Respondent had adopted an elaborate procedure for rating candidates for layoff. Some 67 criteria, called "Competencies," were developed for consideration in rating those candidates, (CX 18 - 20) with the advice of an outside consultant. USEC's Candidate Selection Comparative Summary, the IRIF evaluation form, listed as the candidates for RIF with that current description, "Edwin C. Craven" and "Douglas W. Jones," with the job position titles of "Trainer, Technical," as "position 91." It showed that the final ratings for that department were "run" on May 23, 2000. (CX 18) Mr. Starkey testified that they utilized "objective criteria to make a subjective process more objective" to rate the candidates, employing a list of 67 "Competencies" to do so, with the help of a consulting company. In the selection process, direct division level managers from various portions of the plant were assembled on two teams; half from Paducah and half from Portsmouth, who were then assigned to one or the other plant. Each were allocated job classifications to evaluate. Mr. Wetherell was in the group for trainer positions. The Competencies were then utilized to evaluate trainers, among other employees. This resulted in the job profile ratings of the candidate selection summary. (CX 18) Mr. Starkey confirmed in his testimony that he got with the managers, Bucy and Fowler, to discuss Mr. Jones and Mr. Craven, that the consensus rating of the competencies of the two, were made as objective as possible, recognizing that they were, "dealing in a subjective area."

Mr. Jones testified that he did not hear any explanation from Mr. Starkey as to what the above criteria meant as set forth in the Listing of Competencies of 2/13/01. (CX 21) Reviewing the worksheet for the layoffs, Jones testified that he did not agree with those ratings, based upon a comparison with the evaluations that he had received, and the fact that he did not know about them beforehand. On a scale of 1 (lowest) to 5 (highest) in the "Job Proficiency" category, he received no 5s, 4s or 3s, but received only 1s and 2s, (CX 18) which the previous, comparable mid year evaluation levels do not appear to have warranted.[22]

[22]Job Profile: 5) = Towering Strength; 4) = Talented; 3) = Skilled; 2) = Weakness; 1) = Serious Issue. Functional/ Technical Ratings: 5) = Towering Strength; 4) = Exceeds Expectations; 1) = Minimum Proficiency; 0) = Not Proficient.

Mr. Jones felt that the layoff ratings were a fiction or pretext that were not true or accurate. He used several examples, in none of which he was ever told they would involve criteria for being laid off. These included he following "Competencies " the most egregious of which were all rated a low "1" or "2" on the scale of "5": "Creativity" - (Mr. Jones was never told by management that he was not being creative, and in fact was told that the modules he created were good.); "Customer focus" - (He was never told that he did not have customer focus.); "Integrity and trust" - (He was never told that he could not be trusted or did not have integrity. In fact, it was the opposite on his midyear evaluation by Mr. Fowler, in which Fowler stated that his integrity and trust were never in question.); "Interpersonal savvy" - (Jones was never told that he lacked interpersonal savvy, and gave examples of how he obtained information from the workers, such as the overhead crane operators, on how to operate cranes by telling them that he knew nothing about operating cranes, was completely dependent on them for the information, and thus built rapport with them to get the information necessary to build the module.); "Listening" - (This also applied to his previous example.); "Priority setting" - (He was never told that he had difficulties in setting priorities. In terms of the goals that were jointly set up by Fowler and Jones, Jones testified that he, in fact, kept up with the tasks and priorities that were set on March 15th.) and Knowledge of Federal and State Laws and regulations and requirements necessary for the NRC - (Mr. Jones testified that in his opinion, that was his strength.)

With regard to "Integrity and Trust," Mr. Bucy responded that he did not know the criteria that was used in the meeting regarding this rating. (He responded similarly, that he did not know the criteria, to several of the other ratings. A leading question on redirect examination, asking whether, if he had the definitions in front of him, his ratings would have conformed to the definitions, did not rehabilitate his answers. For one thing, he was not shown those definitions, which I assume were in the 67 criteria, so he never reviewed what was in the definitions for the answer. The blanket answer was an interesting foundation question, but required a more direct review of the criteria.) He stated that he did not tell Messrs. Starkey and Fowler that he could not trust Jones; that he was a man of low integrity, or that he was dishonest.

Further discussing the Competency on "Creativity", Mr. Jones read aloud that it stated: "Comes up with a lot of new and unique ideas. Easily makes connections among previously unrelated notions. Tends to be seen as original and value added and brainstorming sessions – settings." He testified, without contradiction, that he did away with the training course calling safety procedure overview that had been in place as a worthless course, taken every three years for license recertification, but consisting only of forklift and crane as a classroom course. Once the TRG was formed for the MIE/PIT training module, he suggested various ways to comply with OSHA regulations to insure compliance and benefit the plant. The only brainstorming sessions (not "settings" as stated in the transcript - T 201 - 202) that he could recall were ones that he had done in the TRG, while there were none with management. He stated that he asked questions, but there was very little brainstorming going on. Basically, the OSHA regulations did not require retraining, but did require documentation that they were trained, which is how they determined that they were in compliance. For instance, he did the research on that, and reported it to management; he would take the published OSHA interpretations for a piece of equipment A, and

then apply those to equipment B to make an analogy so that they could use the same interpretation on both, and management reacted favorably to these.

Mr. Bucy acknowledged that the PIT module created by Mr. Jones was the first PIT module developed there. Still, he rated him a "2" in the competencies for his creativity, but could not remember the criteria used for that. When asked, he said that there was a negative comment from the maintenance department on the module, but could not remember the source; nor did he make a written record of it. He also confirmed that they had never had the program rewritten, implying that it was still in use. I conclude that this rating was unjustified by Mr. Jones' performance, and not otherwise explained by management witnesses.

On "Customer focus", Mr. Jones confirmed what appeared to be an ongoing issue between level of training and compliance with the law. For instance, in explaining the necessity for a the level advocated by Mr. Jones, the person running the TRG would take what he said into consideration to determine what was a PIT and what was not. He was never aware of any issues between management and him in the environmental area. As an example he met with the waste management official, and reviewed its training module for compliance, and was favorably received. Again, this testimony was uncontradicted.

It was the contention of Mr. Jones in his testimony that there is a necessity that one know in advance how they are going to be rated or graded for layoff so that one could work toward those objectives, and that while "Integrity and Trust" was also listed for the scheduled evaluations, and "Interpersonsl skills" in the evaluations could be interpreted as, "Personal savvy," in the Competencies, he was unaware that he would be rated on the rest of the Competencies as he later learned of them. While Jones maintained that the Competencies rated for the layoff (CX 18) should not have been implemented for his job, "unless you've been told beforehand," he conceded that they otherwise might have been appropriate if you were just making up the form, "from scratch", to evaluate people. I agree with this assessment. However, the employees should have been so informed, particularly because there might have been variances in the definitions of the competencies versus the areas covered in the evaluations, and that there might have been other areas to have been evaluated.

Mr. Jones satisfactorily rejoined queries on the following Competencies: "Comfort around higher management," "Composure," "Customer focus," "Integrity and Trust," "Personal learning," "Presentation skills," "Priority setting," and "Technical learning," and the extent to which he viewed those areas as encompassing various sub-areas of criteria and his agreement or disagreement on both what they encompassed and the respective ratings. (CX 18 & 20)

I credit and give great weight to Mr. Jones comparison of the "Competencies" to the scheduled evaluation ratings, and otherwise give his testimony great weight. I give little weight to the testimony of Mr. Starkey on these points, based upon my preceding determinations regarding his testimony concerning the treatment of Mr. Jones after his transfer into the training department, in particular with regard to Jones' raising of safety issues in his own inexperience and lack of

training, which I conclude were primarily managerial responsibilities, being foisted onto Jones.

Mr. Craven and Mr. Jones were the two whose names came up on the layoff candidate selection sheet, (CX 18)[23] and the end result, according to Mr. Starkey, was that Craven was rated higher than Jones. He said that Jones "does good" as an instructor, but that "Craven is an excellent instructor" and that Craven was more composed with his interaction with managers, thus reflecting the low marks given partially for his knowledge of regulations, integrity and trust; very good with customers, and a hard worker, and complimenting Craven's integrity and trust. Starkey admitted that both had a lot of technical knowledge, with Craven picking things up and running with them, while he felt that Jones did not. He rated Craven better than Jones on setting priorities, which was reflected in getting out the action plan, and rejected the complaints of Jones that he was not given the opportunity to train on mobile equipment, stating that he had multiple opportunities to do so. Starkey testified that he had assigned Craven to help Mr. Jones (just before the layoff evaluations), since Craven had more experience, and a demonstrated ability to take such programs from the ground up. (Mr. Bucy confirmed that Craven started in the PIT program at the same time that he did, which would be in February 2000, one month before the ratings for the layoff began in March 2000.) There is, however, no evidence that Craven participated in the MIE/PIT program with Jones and the supervisor before the layoff. Mr Starkey ended by stating that Craven presently (at the time of the hearing) spends one half his time on the MIE program, and one half in others, such as health physics and operations training and noted how effective Craven had been since the layoff.

Mr. Starkey testified that when he met with Mr. Jones to tell him of the layoff, Jones asked if it was "performance based." Starkey said that it, "was not;" that it was not "for cause," and that if it was, he would not have needed an RIF to do so. He stated again, that, "It was a business decision based on – as objective an evaluation process as the company could devise to meet the its business needs. He denied that it was quite the contrary, noting the problems with the MIE program brought to attention by him, and his "chagrin" was in not moving fast enough to resolve them, which was his "whole responsibility," which he had just stated was 80% the responsibility of Jones, and 20% Fowler. Again, it is my conclusion that this is reversed, and an attempt to hold Jones responsible for managerial responsibilities, without any attribution to Starkey, himself.

When Mr. Starkey was asked whether there was a barometer in the trainers' cases such as that for a secretary typing so many words per minute, he stated that the Competency rating process was a "consensus" process; [meaning that when a consensus of the joint management team agreed on a rating, that was what the candidate was given.] When asked what that barometer was for that in Craven's case, Starkey then used anecdotal evidence of Craven's actual performance after his transfer to the MEI/PIT module project as a verification, stating that the module that he used was the cylinder hauler training module. He proceeded to confirm that

[23]Mr. Starkey verified that there was no way that Mr. Jones could have known that he was in the IRIF pool, and could produce no documentation that Jones was in the pool in 1999.

although the signature on it was Craven's, the module "may well have been" the preparation of Mr. Jones. (CX 17) Despite Craven's signature on the module, Jones testified without contradiction that he also prepared the cylinder hauler training module. The module included identifying the OSHA regulations related to the actual haulers used at USEC. Mr. Starkey's testimony is simply not credible on his explanation of Craven's superior performance. Since this was all Jones' work, it could not credibly stand as a verification of what Craven had done after Jones' IRIF.

Mr. Starkey testified that while one half a full time employee (Mr. Craven) then did the MIE program after the IRIF, he did not know whether it was a safe practice to have only one half an employee assigned to the MIE training.

Mr. Starkey confirmed that it was supervision that had to insure that employees performed their duties; that Jones' supervisor from April 1999 to March 15, 2000 was Mr. Fowler, that there was no documentation that Jones was to do only the MIE training; that training was only supposed to be done for new MIE employees; that the RIF of Henderson necessitated assignment of all his work to someone else; that he was aware of an NRC finding that employees were performing in an atmosphere that had affected the use of ATRs; that he did not recall use of the word "chilled" or "chilled environment;" in connection with that investigation, and that the program had to be "improved so that folks would be more comfortable using the employee concerns program." In other words, it was not unreasonable for Jones to conclude that the objection to his use of the employee concerns program compared to his own results was confirmed.

Mr. Jones confirmed that Mr. Bucy was one of the managers who rated him for layoff; that, just two weeks prior to the layoff; the last correspondence between Mr. Wetherell and Mr. Weber involved Jones' employee concern on the training modules discussing his feeling of that Bucy had set him up in suggesting that he file the employee concern in the first place, and that Bucy then did not back him on it, and that, shortly after that, he was laid off. I can only conclude that this credibly creates a timing issue that must be resolved favorably to the benefit of Jones, and so find.

When asked whether any shortcoming of his own contributed to his lack of making significant success, Mr. Jones answered, "No," and added that he was given the job and told to do it when he was not adequately trained, and that there was a tremendous safety issue, there, to which Mr. Starkey merely replied, "Fix it." The answers to the questions on the Competencies posed by Respondent, were all the ones previously set forth as the problem areas in the letter of Mr. Jones on January 10, 2002 in which he responsibly requested that the MIE duties be transferred from him. (CX 8) (While I believe that the "No" is an overstatement on the part of Jones, born, perhaps, of the changed atmosphere from that of the MIE/PIT area to the more academic/scientific side of the plant's business, the fact is that he did learn; that this is reflected both in his ultimate completion of the module, and that

the scores that he received from the trainees in the program, as well as its continued use, verify its success. In other words, the attempt to pass the responsibility for the timeliness shortcomings of the new program onto the shoulders of Mr. Jones, must fail as a business justification for his layoff.

Remedy**:**

Mr. Jones testified that when he was laid off, he was off from work from July 5th to October 9th, 2000, or three months, and that, when he was finally hired by his employer at the time of the hearing, Lan Associates, he still worked on the USEC Gaseous Diffusion Plant grounds doing subcontract work for the Weskem Company, a Department of Energy (DOE) contractor for Bechtel Jacobs. His annual USEC salary was $52,000.00, and $49,500.00 for Lan; while Lan has no pension fund, as did USEC. He received normal severance pay, rather than enhanced severance pay, and received the normal for Kentucky maximum unemployment compensation benefits.

In addition, he testified that he was, "hurt, disappointed, devestated, especially after seeing ... I had worked there for 12 years and for the first 11 I was a good employee, and then, all of a sudden, I was ... rated as just a really, really bad employee ... that will tend to depress you." (T 177)

CONCLUSIONS OF LAW

Applicable Law:

As discussed above, the present case has been brought under the employee protection provisions of the Energy Reorganization Act. Its "whistleblower" provisions are designed to protect employees from retaliation for protected activities such as complaining, testifying, or commencing proceedings against an employer for a violation of this Act. *Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993). The employee protection provisions of the Act have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. *See, Devereux, supra, and Tyndall v. U.S. Environmental Protection Agency,* 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998), final order approving settlement and dismissing complaint, 96-ARB-195 (ARB Sept. 25, 1996). For reasons more particularly set forth herein, I find Mr. Jones had either raised particular issues or begun proceedings, or was about to begin, proceedings under the Act, and will proceed accordingly.

The purposes and employee protections of The Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851, address "whistleblower" protection against harassment and retaliation by an "employer" for employees involved in the nuclear industry, who: (1) notify their employer of an alleged violation, (2) oppose a practice that would be a violation of the Atomic Energy Act of 1954, (AEC) or (3) testify before Congress or any Federal or State agency regarding a violation of the AEC.

It states that "[n]o employer" may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because the employee engaged in the above activities, or has assisted or participated or is about to assist or participate in any manner in such proceedings as those listed, "or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954."

Under the ERA, once the complainant establishes a prima facie case, the employer must establish by clear and convincing evidence that it would have taken the same unfavorable action, i.e. taken its unfavorable action for a legitimate, nondiscriminatory business reason, as it would have taken, in the absence of the employee's protected activity, rather than merely "articulating" or stating the legitimate business reasons for the action. The employer may be directed to "abate" certain effects of the employer's unfavorable personnel action (which means that the discriminatee may be ordered reinstated with back pay) except compensatory damages, pending court review of the final decision of the Secretary of Labor.

The implementing regulations governing employee complaints, 29 C.F.R. Part 24, provide at 29 C.F.R. §24.1 that "No Employer" may discharge or otherwise discriminate against any employee who has:

> (1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statues listed in Section 24.1 or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
>
> (2) Testified or is about to testify in any such proceeding; or
>
> (3) Assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute, ... (Emphasis added)

- or, under the ERA, has notified the employer of, or, on notice to the employer has refused to engage in, any action prohibited by the Atomic Energy Act of 1954, or has testified concerning any of the provisions of the Acts in any federal or state proceeding, as stated in the above 1992 amendments. 29 C.F.R. Section 24.2(a)-(c).

In addition, as also stated above, 29 C.F.R. §24.7(b) states that a determination of a violation of the ERA may only be made under the statutory provisions that the "protected behavior or conduct was a contributing factor in the unfavorable personnel action ...," and that the respondent has not demonstrated, "by clear and convincing evidence that it would have taken the same personnel action ..." as it would have taken without such protected behavior. The rule provides that, upon finding a violation of the ERA, the determination "shall" contain a recommended order "that the respondent take appropriate affirmative action to abate the

violation, including reinstatement to his or her former position, if desired, together with the compensation (back pay) ...[etc.] ... and, when appropriate, compensatory damages," with the compensatory damages not effective until final decision by the Administrative Review Board. 29 C.F.R. §24.7(c)(1)&(2).

Standards for establishing violations of the ERA:

Related to the establishment of jurisdiction under the ERA, a complainant in a "whistleblower" case must first establish that the respondent is an "employer" under the provisions alleged to have been violated under the Act, and satisfy the initial burden of establishing a prima facie case of discrimination by showing the following:

(1) The "employer" is subject to the Act; 29 C.F.R. §24.2(a); ERA: 29 C.F.R. §24.5(b)(2)(ii)

(2) The complainant engaged in protected activity; 29 C.F.R. §24.2(b)(1)-(3): ERA: 29 C.F.R. §24.2(c)(1)-(3) and 29 C.F.R. §24.5(b)(2)(iii)

(3) The complainant was subjected to an adverse employment action; 29 C.F.R. §24.2 (a)&(b)

(4) The employer "knew" of the protected activity when it took the adverse action, ERA: 29 C.F.R. §24.5(b)(2)(ii), and

(5) An inference is raised that the protected activity was the likely reason for the adverse employment action. (*i.e.* ERA: the protected activity was a contributing factor in the unfavorable personnel action. 29 C.F.R. §24.5(b)(2)(iv)

See, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981); *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.,* 735 F. 2d 1159 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.,* Case No. 91-ERA-46 , slip op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom., Carroll v. United States Dept. of Labor,* 78 F.3d 352, 356 (8th Cir. 1996).

In general, under established case law, once having established the employer/employee status, the employee must establish his prima facie case, and under the ERA, that it was a contributing factor to the unfavorable personnel action. The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Under the ERA, the respondent must produce clear and convincing evidence to establish a legitimate, nondiscriminatory reason for its action, while it may merely articulate the legitimate, nondiscriminatory reason under the other environmental statutes. Complainant, then must counter respondent's evidence by proving that the legitimate reason proffered by the respondent is false or a pretext for the prohibited discriminatory reason. See,

Yule v. Burns International Security Service, Case No. 93-ERA-12 (Sec'y May 24, 1994)(Slip op. at 7-8). This burden now includes the entire analysis of the burdens of production, proof and shifting obligations in a Title VII, Civil Rights action under 42 U.S.C. Section 2000e cases to the relevant environmental "whistleblower" cases, as established under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Burdine, supra,* through *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993).

From the outset, under *Yule*, the complainant maintains the burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. *See, St. Mary's Honor Center v. Hicks, supra; Darty v. Zack Company of Chicago*, Case No. 82-ERA-2 (Sec'y Apr. 25, 1983) (Slip op. at 5-9) (citing *Texas Department of Community Affairs v. Burdine, supra*. Additionally, with specific relationship to the ERA, the Secretary stated in *Thompson v. TVA*, 89 ERA 14, (Sec'y July 19, 1993) that, under *Hicks* and *Burdine*, after the employer establishes its legitimate non-discriminatory rebuttal, the first determination that must be made is whether the evidence shows that the discriminatory reason is more likely the motivation for the adverse reason. The rules clarify this obligation by adding in parenthesis, as set forth above, that the Complainant must prove that the protected activity was a "contributing factor in the unfavorable personnel action." Simply stated, the complainant continues to bear the burden of proving allegations of discrimination by a preponderance of the evidence.

This view is no different than what has recently been clearly restated by the United States Supreme Court in its review of *Hicks* in, *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, (2000), wherein the Court assumed (without deciding) application of the *McDonnell-Douglas/ Hicks* standards to court analysis of alleged violations under the Age Discrimination in Employment Act (ADEA). Indeed, the Court in *Hicks*, adopted its prior 1981 standard as set forth in *Burdine, supra,* that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," 450 U.S. 253, as now reinforced in *Reeves, supra.*

In the present case, weighing the impact of settled case law and the rules set forth at 29 C.F.R. Part 24, which codifies the above case law rules, Complainant has established that he was engaged in protected activity; that an adverse action has taken place against him (his layoff or IRIF) and that an inference has been established that his protected activity was a contributing factor to his layoff. USEC has articulated what is facially a "legitimate non-discriminatory" business reason for the unfavorable personnel, or adverse, action (layoff), in that it would have taken the same personnel action against Mr. Jones as it would have taken without his protected behavior. It is my opinion, however, that it has not established that position by clear and convincing evidence.

While the "legitimacy" and "non-discriminatory" basis for the action is called into question by Mr. Jones' challenge to it, as either lacking credence or constituting a pretext for the action under the ERA burden shifting/ production standards, the result is the same: once the hearing has taken place, and the prima facie case presented with the business reason for the action established

by the employer , the burden shifting analysis drops away, and Mr. Jones continues to have the burden of establishing whether the evidence shows that the discriminatory reason is more likely the motivation (the contributing factor) for the adverse action. In other words, he still must establish that his protected conduct remained a contributing factor in his unfavorable personnel or adverse action, and he was discriminated against in violation of the applicable statutes by a preponderance of the evidence.

For the reasons set forth herein, I find that Mr. Jones has met his burden of establishing a substantial, reasonable basis for his belief that his raising of safety considerations in his lack of training to be a trainer of operators of mobile industrial equipment (MIE) for powered industrial trucks (PITs) at USEC was subject to the "whistleblower" protections of the ERA; that his actions were a contributing factor to the adverse action (layoff), and that he has established a violation of the ERA by a preponderance of the evidence. As part of this, I find that the employer has not established by clear and convincing evidence that the layoff of Mr. Jones was for a legitimate business reason, or that it would have taken the same unfavorable personnel action in the absence of his behavior.

Since this case has been presented to the undersigned after a full hearing on the matter, the Complainant's ultimate burden of proof remains: to establish his allegations of violations of the Act by a preponderance of the evidence, as the paramount standard.[24] The following step-by-step analysis is presented for the sole purpose of order in understanding the various principles involved in evaluating the evidence in this case.

1. USEC's "Employer" Status:

Under 29 C.F.R. § 24.2 (a) the complaining employee must establish that the alleged discriminating employer is an "employer" subject to the Act. For the ERA, 42 U.S.C. § 5851, to be applicable, it must be determined if: (1) USEC is an employer, and (2) there is a sufficient nexus of the complainant's protected activity and respondent's adverse action to constitute a violation of the ERA. *McNeal v. Foley Co.*, 98-ERA-5 (ALJ Jul. 7, 1998).

Title 42 U.S.C. § 5851(a) states that the term "employer' includes:

> A licensee of the Commission [NRC] ... under ... the Atomic Energy Act of 1954 (42 U.S.C. 2021);
>
> (B) an applicant for a license from the Commission or such an agreement State;
>
> (C) a contractor or subcontractor of such a licensee or applicant . . . .

[24]See, ALJ's comment in *Niedxielski v. Baltimore Electric, Co.*, 2000-ERA-4 (July 13, 2000), to the effect that, "working through the prima facie case is useful since the ultimate burden of proof still involves many of the elements covered in the prima facie analysis...."

> (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 710 d. of the Atomic Energy Act of 1954 (42 U.S.C. § 2210(d)) .." but not contractors under E.O. 12344.

By the 1992 amendments to the ERA, Congress clarified the coverage of existing "whistleblower" protection provisions to include as "employers," those employers of employees involved in any activity under the ERA or AEC, and established a separate paragraph to include the Nuclear Regulatory Commission, and (NRC)licensees, contractors, subcontractors of licensees, or applicants therefore. (H,R. No. 101-474(VIII), reprinted in 1992 U.S. Code Cong. & Admin. News 1953, 2296-2297).

Reflecting the legislative history is Appendix A to Part 24 (FR #98-2922, filed Feb. 6, 1998). It reinforces that history by stating:

> The ERA makes it illegal for *an employer covered by the act* – including a licensee of the NRC . . . , an applicant for a licensee, a contractor or subcontractor of a licensee or applicant . . . – to discharge or otherwise discriminate against an employee in terms of compensation, conditions or privileges of employment because the employee or any person acting at an employee's request performs a protected activity. (Emphasis added.)

Using all three documents, 42 U.S.C. § 5851, the legislative history to HR #102-474 and Appendix A of Part 24, it may be concluded that Congress meant to cover the actions of all employers and employees who would be involved in any phase of any "proceeding" involving the training of employees who deal with the in plant transportation of nuclear materials covered by the ERA and Atomic Energy Act of 1954. I find that this includes reasonably based training and safety recommendations for the training of employees by the trainers of such employees such as Mr. Jones, regardless of whether it ultimately resulted in the transportation of nuclear materials covered by the NRC and the Atomic Energy Act of 1954 or not, since the continuing objective in this training would have involved the safety and health of the employees who do transport and move those materials.

An additional consideration is that, if the ERA "whistleblower" provisions provide protection only to those employees of commission licensees, applicants, contractors or subcontractors who pursue quality and safety investigations and complaints, but denies Mr. Jones, a trainer of those employees, that same protection, it would be contrary to the intent of Congress in bringing safety and quality problems to light and resolving them before accidents or injuries occur. *Hill v. TVA*, 87-ERA-23 (Sec'y May 24, 1989) at 6.

The second prong permits ERA jurisdiction if there is some "nexus between the activity for which protection is claimed and a goal, objective or purpose of the Atomic Energy Act of the chapter of which Section 5851 is a part." *McNeal v. The Foley Co.*, 98-ERA-5 (ALJ Jul.7, 1998) at 10. *See, Van Beck v. Daniel Construction Co.,* 86-ERA-26 (Sec'y Aug. 3, 1993) at 3 ("in

order for jurisdiction to attach under §5851, a nexus must be established between the alleged protected activity and the objective or purpose of the ERA"), final order approving settlement (Sec'y, Feb. 10, 1994). As stated above, training employees to transport or move covered materials under the Atomic Energy Act of 1954, is covered, whether he actually moves them or not, or whether his safety and health recommendations regarding such materials are adopted or not.

Generally, there is a nexus if "the complainant's concern implicates a nuclear safety hazard or the complainant . . . reasonably believe[s] there is a nuclear-related safety hazard." *McNeal v. The Foley Co*, 98-ERA-5 (ALJ Jul. 7, 1998) at 11. The Sixth Circuit has proclaimed that the ERA statute is designed to "protect workers who report safety concerns and to encourage nuclear safety generally." *American Nuclear Resources v. U.S. Dept of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). "[C]ourts have held that the ERA protects many types of acts that implicate safety. For example, the ERA protects an employee who files internal reports concerning regulatory violations." *Id.* @ 1295, citing, *Jones v. TVA*, 948 F.2d 258, 264 (6th Cir. 1991).

I find that Mr. Jones' health and safety complaints and recommendations regarding training and the failure to have properly trained trainers of mobile equipment that moves or transports UF_6 and/or other related products have invoked both OSHA and NRC regulatory considerations. In so doing, they have necessarily implicated the broad public health and safety considerations meant to be included within the scope of the ERA, and the broad remedial purposes of the ERA. USEC is an "employer" under the ERA, and that there is a sufficient nexus of his conduct to the purposes of the ERA to extend coverage to Mr. Jones' activities thereunder.

2. Complainant's Protected activity:

a. General Rules:

The environmental statutes all protect an individual's participation in activity which furthers the respective statutory objectives. *See, Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993), *supra, and Jenkins v. U.S. Environmental Protection Agency,* 92-CAA-6 (Sec'y, May 18, 1994). In other words, the Acts protect the reporting of environmental or safety violations. *See, Johnson v. Old Dominion Security,* 86-CAA-3,4-5 (Sec'y May 29, 1991). Protected activity is broadly construed under the environmental whistleblower protection acts. *See also, Guttman v. Passaic Valley Sewerage Commission,* 85-WPC-2 (Sec'y March 13, 1992). Concerns that "touch on" the environment can be considered as "protected activity." *See, Dodd v. Polysar Latex,* 88-SWD-4 (Sec'y 22, 1994).

Internal complaints are also considered, pursuant to the environmental acts, as "protected activity." In *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996) the Board held that "[i]nternal safety complaints are covered under the environmental whistleblower statues

in the Eighth Circuit, the Fifth Circuit and every other circuit. See, Amendments to the ERA in the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. NO. 102-486, 106 Stat. 2776," and Dodd, *supra* (CERCLA & SWDA); *Reynolds v. Northeast Nuclear Energy Co.,* 94-ERA-47 (ARB Mar. 31, 1997) (ERA); *Passaic Valley Sewerage Commissioner's v. United States Department of Labor,* 992 F.2d 474 (3d Cir. 1993) (CWA); *Wagoner v. Technical Products, Inc.,* 87-TSC-4 (Sec'y Nov. 20, 1990) (TSCA); *Guttman v. Passaic Valley Sewerage Commissioners,* 85-WPC-2 (Sec'y Mar. 13, 1992). The Board further noted in *Hermanson* that the only exception to this rule at that time prior to the 1988 amendments, had been "for cases filed in the Fifth Circuit under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. Section 5851 (1988), prior to October 24, 1992." *Brown & Root, Inc. v. Donovan,* 747 F.2d 1029 (5th Cir. 1984)

In addition, an informal complaint, such as verbal communication, constitutes "protected activity." *See, Nichols v. Bechtel Construction, Inc.,* 87-ERA-44 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), aff'd in *Bechtel Construction, Inc. v. Secretary of Labor, 50 F. 3d 926, 931* (11th Cir. 1995) stating that "general inquiries regarding safety do not constitute protected activity," but a pattern of inquiries regarding how to handle contaminated material can add up to protected activities." See, also, *Dysert v. Westinghouse Electric Corp.,* 86-ERA-39 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected); *Crosier v. Portland General Electric Co.,* 91-ERA-2 (Sec'y Jan. 5, 1994) (complainant's questioning his supervisor about an issue related to safety constituted protected activity). The environmental "regulations make it clear that a formal proceeding is not required in order to invoke protection of the Act." *Kansas Gas & Electric Company, v. Brock* , 780 F.2d 1505, 1512 (10th Cir. 1985), *cert. denied,* 478 U.S. 1011, 92 L.Ed.2d 724, 106 S.Ct. 3311 (1986).

To constitute protected activity, however, the substance of the complaint must be "grounded in conditions reasonably perceived to be violations of the environmental acts." *Minard v. Nerco Delamar* Co., 92-SWD-1 @ 5 (Sec'y Jan. 25, 1994). It is insufficient to show that the environment may be negatively impacted by the employer's conduct. *Decresci v. Lukens Steel Co.,* 87-ERA-13 (Sec'y Dec. 16, 1993) (the environmental whistleblower provisions are intended to apply to environmental and not other types of concerns.)

b. Specific Protected Activies:

Mr. Jones' specific protected activities in the present matter consisted of, but were not limited to, the following actions: Repeatedly addressing the OSHA and NRC regulation violations implicit in not having properly trained and licensed trainers on MIE/PIT equipment; in not being properly trained and licensed himself; in never having anyone fail the prior program; in the filing of eleven ATRs and employee concerns involving the various violations, as otherwise more specifically set forth herein.

3. Adverse Action:

An "adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman,* 1997 115 F.3d 1573 (11th Cir. 1997). "Adverse action" encompasses any discrimination with respect to an employee's compensation, terms, conditions or privileges of employment. *DeFord v. Secretary of Labor,* 700 F.2d 281 (6th Cir. 1983).

I find that, in addition to the individual adverse actions discussed above in response to individual acts of protected conduct and activity, the present layoff or IRIF constituted a specific adverse action, much more than something unpleasant in Mr. Jones' case which warrants a specific remedy or remedies. It resulted in not only loss of income or benefits, but loss of reputation and prestige, as well as a lower paying job.

In addition to the above specific findings of adverse actions set forth in the discussion of protected activity, I would add the following as a type of conduct that is recounted throughout the findings of fact which constituted discriminatory adverse conduct and/or evidence of discriminatory conduct, as the background for the specific violations as alleged:

1. The unjustified, low, "1" and "2" ratings of Mr. Jones' "Competencies" for the IRIF Candidate Selection Summary, concerning, but not limited to, his "Integrity and trust," his "Creativity" and his "Knowledge of rules and regulations", all of which had previously been high ratings on his scheduled evaluations, just three months before the IRIF evaluation, and which could affect his entire career.

2. The active "shunning" of Mr. Jones by Mr. Bucy following Mr. Jones' questioning him on the requirements of the regulations, which I find to have taken place.

3. The insertion of Mr. Craven into the trainer position and permitting him to pass as the originator of training modules that were, in fact, the work of Mr. Jones.

4. Knowledge of Protected Activity:

Respondent's knowledge of a protected activity at the time of its adverse action is an essential element of the complainant's prima facie case. *See, Morris v. The American Inspection Co.*, 92-ERA-5 (Sec'y Dec. 15, 1992), slip op. At 6-7. Complainant has easily sustained this burden. It was the ATRs, reports and e-mails from Mr. Jones to Messrs. Fowler, Bucy, Starkey and Wetherell concerning the safety and health of employees being trained by someone without adequate training, and not in conformance with OSHA regulations, that led to the delays in designing and implementing the training modules, his low ratings by management for them and his resultant IRIF, as otherwise more specifically set forth herein.

5. Motivation and Timing:

A complainant must produce sufficient evidence to raise an inference that the motivation for the adverse action was his protected activity. Temporal proximity between the whistleblowing activities and the adverse actions is sufficient to establish a prima facie case. *Tyndall v. U.S. Environmental Protection Agency,* 1993-CAA-6, 1995-CAA-5 (Administrative Review Board, June 14, 1996), final order approving settlement and dismissing complaint, 96-ARB-195 (ARB Sept. 25, 1996), citing *County v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Bartlik v. United States Department of Labor,* 73 F.3d 100 (6th Cir. 1996). However, in *Hadley v. Quality Equipment Co.*, 91-TSC-5 (Sec'y Oct. 6, 1992), the Secretary indicated that although a sequence of events occurring in a short period of time may invoke an inference of causation, it is still necessary to examine the events as a whole in determining whether the ultimate question of whether a complainant has proved by a preponderance of the evidence that the retaliation was a motivating factor in the adverse action. In other words, an administrative law judge may decline to find retaliation, notwithstanding the short proximity of events, if other facts show that complainant would have been fired had he not engaged in the protected activity. *Hadley, supra*, (employee engaged in a stream of obscene behavior immediately prior to adverse actions by employer) ; *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 (Sec'y Mar. 4, 1996) (complainant was fired for being out of his work area rather than his protected activity even though there was temporal proximity between the protected activity and discharge).

In the present case, motivation may be inferred from the timely sequence of events related to the raising of OSHA and NRC regulatory health and safety issues that were delaying the implementation of the MIE/PIT training program; the failure to properly address Mr. Jones' plea for OSHA compliant training; the shunning of Jones by Mr. Bucy; the transfer of MIE/PIT training duties to Mr. Craven so that there could be a comparative analysis to lay someone off, when the conditions would have militated against the layoff of the trainer in that area, namely, Jones, and the deliberate manipulation of the lay off ratings to accomplish that end.

The timing of the IRIF in relation to the initiation of the layoff review process to other matters has been considered and discussed in reaching my conclusions. The layoff occurred on July 3, 2001. The IRIF review process began in May 2000. Mr. Craven was transferred in to Mr. Jones' department shortly before the IRIF review process began, with its undisclosed rating of 67 competencies, just 3 months after the mid-year evaluations. As indicated above, the rating process, which actually began with the one unsatisfactorily explained "B" on the mid-year evaluation, tracked several of Mr. Jones complaints about the overall situation arising from his lack of experience and training, his raising of OSHA and NRC issues on these matters, and his filing of ATRs and employee concerns about them.

6. The "legitimate and non-discriminatory" business reasons:

The respondent has the burden of producing evidence to rebut the presumption of disparate treatment established by complainant's prima facie case, by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons for the adverse action. *See, Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. 248 (1981) (Title VII case). This must be established by clear and convincing evidence under the ERA. The complainant, however, retains the ultimate burden of proof. He must establish by a preponderance of the evidence that respondent's adverse actions constituted discrimination for his protected activity. Here, I have concluded that it was Mr. Jones' protected activity that was the motivating factor in Respondent's decision to lay him off, or to IRIF him, and the other actions of rating him so low in certain unwarranted, designated areas of performance and in shunning him. *Dysert v. Westinghouse Electric Corp.*, *supra* and *Texas Dept. of Community Affairs*, *supra*.

In a nutshell, respondent presents the following as its justification for the "adverse action," in the decision to layoff Mr. Jones: The layoff was part of a large reduction in force; was not performance based; was because his quality of work was "mixed" in the training department; was not because he was an effective trainer, which he was, but he had problems revising training modules, refusing to accept responsibility for shortcomings and blaming management, and his own lack of experience and training; was not due to protected activity because he did not object to any protected activity; was a result of management concern that Jones was slow and ineffective in correcting problems that he discovered. Respondent contends that Jones has presented no evidence that his layoff was motivated by an improper intent of management. For this, respondent relies upon the steps of the evaluation and rating of "Competencies" in the layoff process, and the relatively "objective" conclusion that was reached in comparing trainer Craven with trainer Jones to reach the final decision to lay Jones off.

Recognizing that Mr. Jones was part of a general layoff, I reject Respondent's position that it was not on a performance basis, and find that despite protestations that the layoff was not "for cause," the record is replete with Respondent's attempts to provide evidence of Mr. Jones' lack of performance as justification for the layoff, as if it was a discharge for cause. Secondly, if the basis for the IRIF of Mr. Jones fails as a legitimate business reason for his layoff, the more stringent standards proof for a just cause discharge also fail for the same reasons that those reasons fail. If the layoff reasons are not justified, and no other reasons are posited by the Respondent to justify a discharge, then there was no just cause discharge and a severe "adverse action" has been established.

On this, I have made the following findings of fact:

I find that Respondent did not establish by clear and convincing evidence that it had a legitimate, nondiscriminatory reason for Mr. Jones layoff or IRIF, or for the low ratings given him on his Competencies for IRIF, and for shunning him, within the meaning of the ERA. While I find that business reasons were articulated in which it contended they were legitimate and

nondiscriminatory, respondent did not establish that Mr. Jones was wrong in his assessment and attribution of blame to management in the timely formation of an OSHA compliant MIE/PIT training program and module, in which his own inexperience and lack of training did play a pivotal role that was correctly assessed by him, despite any shortcomings of his own; that he did object to protected health and safety concerns related to that condition; that he has presented substantial, credible, circumstantial evidence that his layoff was motivated by an improper management intent, and that he would not have been laid off anyway. Respondent has failed to establish by clear and convincing evidence that the reasons for the layoff were either legitimate or nondiscriminatory, so the analysis could end right there. However, to the extent that they might have been so considered I find that those assertions were incredible and also constituted a pretext for the real discriminatory reasons, a termination for his protected activity, as set forth below.

7. Layoff reasons as a pretext:

Once the respondent articulates a legitimate, nondiscriminatory basis for its action, or establishes it under the ERA, the focus shifts to the issue of whether such basis is merely pretextual and that the respondent's action was based on a discriminatory motive. The complainant,

> may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. . . In order to determine that [the complainant] has established discriminatory intent in regard to this adverse action by the [respondent], however, "[i]t is not enough . . . to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination."

St. Mary's Honor Center, supra, 113 S.Ct. at 2749, 2754, 125 L.Ed. 2d at 424.

The main USEC management figures behind the alleged "adverse action" tell different and conflicting stories. The primary people who supervised Mr. Jones and were involved with the decision to IRIF him, were: Ron Fowler, Dannie Bucy, Russ Starkey and Ron Wetherell. Fowler's recount of the lack of training and knowledge of the MIE/PIT area, as well as that of Bucy, at least at the outset of his new transfer duties are substantially different from that of Starkey. So too was the failure of Starkey to assume the blame for those delays, due to that condition, even when raised by Jones to his own detriment. Wetherell's supervisory deficit was in failing to adequately investigate the condition and relying upon an incomplete HR investigation and report on Jones' employee concerns memo. He should have recognized from the outset that he was dealing with a very essential management problem in the structure and operation of the training department where the MIE/PITs were concerned - and a very dangerous one.

It is my belief that the internal "motor pool"[25] mentality regarding this aspect of the Plant's operations were given a secondary status to those operational functions involving the processing of the UF_6. Just the fact that the SAT procedures applied to that production but not to the MIE/PITs has been enough to convince me of this institutional dichotomy, even though the MIE/PITs deal directly with the handling and movement of the product, which may be just as dangerous. More specifically, I also find that the existence of materials or other information for either SAT or non-SAT based procedures, did not constitute training that would have qualified as a "train the trainer" course for Mr. Jones. In addition, I find that the fact that there were materials and/or procedures available concerning the SAT course that was under revision until March 2000, and/or other non-SAT procedures available, did not constitute a training course for Mr. Jones; that this condition contributed to the delays encountered by him in creating the necessary MIE/PIT training modules, and that this condition was one created by USEC management over which Mr. Jones called to their attention, but had no control. In other words, management had complete control over this element of the delay; thus legitimizing the statements of Mr. Jones to USEC officials that his lack of training encompassed safety matters in the training of employees who would be operating the PITs, and it constituted protected activity contributing to the conditions relied upon in selecting him for layoff.

As Mr. Jones correctly concluded, this factor alone would justify the immediate formation a TRG with its expert advise for creating a training module. However, these global policy matters were out of the hands of Mr. Jones, and squarely on the shoulders of management. The failure of supervision to recognize this, and to then place the blame for program shortcomings on Jones, is the reason why we are here, and why management must be saddled with the effect of its conduct, which constitutes a violation of the Act.

Ultimately it was the use of the TRG, following the SAT procedures in the non-SAT procedure setting for the MIE/PIT training, as originally advocated by Mr. Jones, and rejected by Diane Snow, that served as the basis for resolving the problem of forming the training modules for that program, including the one attributed to Mr. Craven, but created by Jones. In fact, Mr. Fowler agreed with the TRG approach of Jones, but told him to identify the issues in an ATR. (RX 1) Jones filed one, stating that until there was an agreed upon direction of all parties involved that it would be difficult if not impossible to fix the situation. To his credit, Fowler then stated that he agreed with Jones; that the sooner the better for the TRG; that he was worried about whether Jones was properly trained on meeting the criteria for successful instruction on it; that he appreciated the aggressive nature of Jones demonstrating, finding and identifying those issues, and that guidance toward a cure was what Jones needed. He then complimented Jones, stating, "Good work." (RX 1; T 258 - 259) This provides support for the position of Jones in comparing his prior evaluation to the improvident use of the "Competencies" in forcing his layoff.

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[25]This is a military term relating to the place where it's ground transportation and work vehicles are stored and maintained. It is differentiated from the location of the military equipment used in it's "operations" or the military mission of the base, i.e., aircraft, helicopter, ships, etc.

As stated in the conclusions of fact, Mr. Starkey's testimony regarding his unhappiness with Jones ultimately begged the question of the extent to which his lack of training and experience involved severe safety matters that were being legitimately raised by Jones, and not resolved by either Fowler, Bucy or even Starkey himself, which I find substantially contributed to the real cause of the lack of success of the program. Starkey's allocation of blame turns the managerial obligation on its head, when both the selection of Jones and the failure to get him safely and adequately trained lay squarely on the shoulders of management.

On its face, Mr. Starkey's explanation of the use of the layoff criteria to justify Mr. Jones' layoff, appears to present a legitimate business explanation for the action. However, under scrutiny, the attempt fails. It is based upon a false premise: that, since the criteria utilized to rate the candidates appear to be objective criteria, those criteria are, therefore, objective as a matter of fact! In the application of the process, here is what happens: calling the procedure "as objective as possible," managers who know the candidates, meet, confer and form a subjective "consensus" about selected criteria in the 67 Competencies, and apply them to individual IRIF candidates, actually forming a joint subjective conclusion. Thus, in branding the process "as objective as possible," the joint subjective results becomes objective. The action against Mr. Jones proves the case. An employee whose integrity and trust had never been in question as of three months earlier, is now not only in question, but used as a linchpin in his termination, without cause. Link that with a few other evaluation redefinitions, and he is beyond recall - both figuratively and literally.

I find that the rating of Mr. Jones, of "1" in "Integrity and trust," to have been totally at odds with his prior evaluations, in particular that of his mid-year evaluation three months earlier by Supervisor Fowler stating in handwriting that his "integrity and trust were never in question." Wondering what had prompted management to give him such a new low rating, not only in this category, but in others, I found management witness explanations (i.e., that he failed to recognize and disclose certain shortcomings as a matter of integrity and trust,) not only did not meet my expectations on it, they did not fit within any concept of integrity and trust rating with which I was familiar over thirty five years of labor and employment law experience. When considered as a personal characteristic, Webster's II Dictionary defines "integrity" as: "Firm adherence to a code or standard of values: Probity." It defines "trust" primarily as: "Total confidence in the integrity, ability and good character of another." Mr. Fowler obviously made his handwritten observation on this kind of a combined definition of "integrity and trust." Management witnesses failed to adequately explain the departure, and why the definition used to rate the same person for layoff should be different. I reject that notion, and give the new interpretation no credence.

As indicated above, I find that the application of the "Competencies" criteria here, to Jones, was far from objective. It was indeed subjective, with the overriding factor being the thoroughly subjective disregard of the evidence of OSHA safety violations that Mr. Jones had pursued through his having obtained a thorough knowledge of the rules and regulations governing the safety and health factors that would regulate the MIE/PIT training program. On this, there is a total absence of Respondent evidence that Jones was wrong in his interpretation and application

of the rules, save one where it turned out that the rule had been withdrawn. He recognized those factors and had the integrity and trust to bring them to their attention.

So too was management's assessment of Mr. Jones' "knowledge of rules and regulations" and his "creativity." These were not, in my opinion, objective or accurate ratings, and also contradicted prior ratings, without notice of any change. His knowledge of rules and regulations was, indeed, his "strong point," and his creativity" was demonstrated well above the "2" that he was given. It was precisely because he was raising very legitimate, specific, OSHA regulation safety matters, that delays in accomplishing the training modules occurred, and I so stated in the hearing. Management witnesses did not change my mind on the matter.

Despite management attempts to contradict the "creativity" rating, management did not contradict the facts testified to by Mr. Jones in the creation of the training module(s) that continues to be used at USEC. I find that this was certainly "creative" within the meaning of the Competencies, and facially should have been rated a higher level than a two, especially when measured against his prior evaluations.

With regard to Mr. Craven's place in the process, whatever his ratings were based upon, they could not have been based upon any of his own work with the MIE/PIT program that was virtually the entire rating basis for that of Jones. It was defective reasoning from the outset, comparing "apples to oranges"and verifying the failure of the entire system! It emphasizes the contrast between the scheduled evaluation procedure and the layoff evaluation procedure, with the former requiring employee participation at both the initial and the final rating levels, and the latter devoid of such participation.

No one denies the past training credentials of Craven, but Mr. Starkey's response on the matter simply proves too much. The question arises, why did he transfer him to the MIE training position just before the layoff evaluations, and not do it sooner? Claimant's argument, that if they had not done so, there still would have been a severe need there for a trainer, and that Jones would likely not have been laid off, has merit. The managerial action is not logically explained, and it certainly does not provide a rational business explanation for what they failed to do with Jones before that, when they otherwise admit that he was a good trainer.

Returning to the transfer and his initial evaluation, Mr. Jones did the only responsible thing that he could do at that time: When he realized after his transfer to the training department that his credentials were insufficient for the MIE/PIT program, he fully and courageously, informed management of his predicament and its safety implications. He requested training before being required to complete the training modules, and clearly raised the safety implications of not doing so. Yet, all management could do was to say, "Fix it." I now agree with Mr. Jones that the "Fix it." answer of Mr. Starkey was an inappropriate answer since, as the supervisor of Jones, it was definitely his responsibility to "fix" the problem being presented by Jones, and that he and he alone had the responsibility to see to it that Jones received the proper training before Jones had the full responsibility for completing the MIE training modules. This was neither Mr. Fowler's nor Mr.

Bucy's responsibility, it was that of Mr. Starkey.

In so doing, without resolving Mr. Jones request to solve the training of the trainer requirement beforehand, USEC management (not Mr. Jones) actually (not potentially) endangered the entire plant with everybody in it (not merely those who had anything to do with mobile industrial equipment), and threatened the well being of the surrounding citizenry, for as long as they operated with insufficient training. While no evidence was offered on the effects of a dropped, fractured, gas cylinder from one of its haulers, those effects could have been disastrous. I take judicial notice of the fact that four accidents between the years of 1997 and 2000 were involved with the transportation of such UF_6 cylinders, two of which were related to the Portsmouth, Ohio facility, and have resulted in an NRC proposed revision of the rules governing the transportation of UF_6. [26]

There was no way that Jones could have completed an already long-term, inadequate MIE/PIT training program in a safe and timely manner, any sooner than he did. The fact that he did complete a program, albeit later than expected, was primarily something that should have been considered to his credit. To, however, cast the blame for failures in the entire program to that point onto Jones through the layoff rating process, was a subterfuge for the role of management's own inadequacies. I emphasize, again: if there were two things that were never at issue regarding Mr. Jones, in my opinion, they were his knowledge of rules and regulations governing the process and his personal integrity and trust. Rating him so low on these two known strengths, when he, in fact, had risked his career by utilizing them to call management's attention to the shortcomings of the program, and then getting rid of him through the layoff process for so doing, is exactly what the whistleblower provisions of the ERA were meant to prevent.

It is my opinion that the business explanation offered by Respondent for the layoff of Mr. Jones was contradictory and defective. It lacked credibility for the above reasons, and, therefore, its legitimacy has not been established by clear and convincing evidence.

8. Respondent's "Mixed Motive" Defense:

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[26] See, NRC proposed revised UF6 Transportation Safety Standards, (**Compatibility With IAEA Transportation Safety Standards (TS-R-1) and Other Transportation Safety Amendments; Proposed Rule**, 10 CFR Part 71, comment period closing **July 29, 2002**.) Federal Register: April 30, 2002 (Volume 67, Number 83), Page 21389-21484. The statistics involving accidents in the transportation of UF6 were derived from the comments on the proposed rule as above published.

"Pretext" and "mixed motive" theories regarding an employer's motive for responding to its adverse action against an employee that has established protected activity, are two different and distinct theories, which are sometimes argued as being contradictory. They are not, but they may be sequential. In examining motivation, there is seldom direct evidence such as a picture of a physical act or a tape recording of an admission that the adverse response was for the employee's protected activity. An admission, itself, is rare, but has happened. Normally, circumstantial evidence is required, such as the timing of the adverse action, shifting responses of the employer, or its pretextual nature, are examined to determine motivation. However, in proving the employer's motive by such inferences, "mixed motive" considerations usually arise from the employer's business reasons for its actions, after the timing, shifting explanations and pretextual responses offered by the complainant have been considered, and it has been determined that motive has thereby been established, and a potential violation of the Act is deemed to have been established. Basically, the employer then argues that although there may have been a violation, the employee would have been discharged, disciplined, laid off or otherwise adversely affected, anyway.

This sequence has a long history arising out of National Labor Relations Board (NLRB) experience in developing evidence of discrimination and motivation as set forth in its *Wright Line* cases under the National Labor Relations Act, as amended. (NLRA). *Wright Line, Wright Line Div.*, 251 NLRB 1083 (1980) *enf'd* 662 F.2d 899 (6th Cir. 1981) *cert. denied* 455 U.S. 989 (1982). See discussion and citations at **The Developing Labor Law, 3d Ed.** Pp. 216 - 219, Bureau of National Affairs, Washington, D.C. (1992). In *Wright Line*, the NLRB adopted a two part "mixed motive" theory in which an employer may prevail if it is able to prove that the termination would have occurred even in presence of protected conduct, and also if between the time of the decision for the termination and the termination itself, a legitimate reason for discharging the employee occurs. (Ibid.) This was later adopted by Congress in the ERA when it stated under Title 42 U.S.C. Section 5903d(D), relief may not be ordered under the Act, "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." This will be addressed in the conclusion.

Whether right or wrong in the analysis by Mr. Wetherell, it is my opinion that his actions and those of Weber from HR initially appeared to have presented a legitimate business explanation for USEC conduct in denying the objections of Mr. Jones to the "B" received on his mid-year evaluation, which, at that time was not fatal to his employment. However, they both chose to rely upon Fowler, Bucy and Starkey, who, collectively or individually, were doing an extremely poor management job, as is clearly asserted by them about Fowler, and accepted their explanations about Jones' progress on the training progrma in the MIE/PITs. This set up the scenario for the IRIF competency evaluations, including that of Jones.

The activity of the latter three in particular with regard to Mr. Starkey, whether planned, retaliatory or not, created a box around Jones over the mobile industrial equipment/powered industrial truck (MIE/PIT) training issue. At the outset, this was, at least in part, a result of the inability of Jones to work his own way out of the MIE/PIT box, due to his own lack of training and experience with that equipment. However, that was a fact, of which Starkey, Bucy and Fowler all had knowledge. Their failure to, (1) determine the MIE qualifications of Jones before placing him into the MIE training position; (2) train Jones before so doing, and (3) listen to him when he raised the safety considerations of his own limitations in that training position, helped to create the box, and justified the position that Jones took on it.

The question then becomes, what if any role, either in the overall condition of his inability to handle the MIE, or specifically, his raising of the safety issues, this situation played in his selection for layoff. If it was, indeed, the overall condition, which left management with an unqualified trainer in the position, his selection for layoff might be justified. If it was the fact that he raised the safety issues that called the competency of his immediate superiors into question, as well as his own, and that was the reason for the layoff, then the motivation was in retaliation for his protected activity, and a violation of the Act.

If, however, pretext was established and there was a "mixed motive" for the layoff, consisting of both the unprotected incompetence motivation together with the protected activity in the raising of the safety issues, and the Respondent can establish by clear and convincing evidence that Jones would have been laid off anyway, then there is no violation of the Act. As stated above, relief may not be ordered under the Act, "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."

I find, as a secondary matter, assuming that pretext has been established, and there would otherwise be a violation of the act because of that determination: (1) that this is a "mixed motive" case; (2) that one significant reason for the layoff of Mr. Jones was his inability to handle the mobile industrial equipment, powered industrial truck training modules, which was an essential part of the remaining trainer position duties; (3) that his raising of safety issues related to his lack of experience and training in the operation of MIE/PITs were taken as an adverse reflection on his immediate supervisors for which they wanted him to be laid off, at that time; (4) that Respondent's manipulation of the layoff rating system to create a lower score on what would have otherwise been higher ones that might not have resulted in a score lower than another employee's scores was a deliberate, intentional act of retaliation for his raising of safety and health issues; (5) that Respondent has not established by clear and convincing evidence that Jones would have been laid off, for his inability to handle the MIE training portion of the remaining training position, anyway, and (6) that Respondent's violation of the Act was intentional, as demonstrated by the layoff rating manipulation.

Conclusion:

Here, I find that Mr. Jones was an employee of an employer covered by the provisions of the ERA; that he was a member of the class of employees protected by the "whistleblower" protective provisions of the ERA; that he was engaged in protected activity as the employee who managed to call attention to the safety implications of his proceeding in the training position without the trainer training necessary to create an MIE/PIT training module; that he was laid off in retaliation for the issues that he raised about these matters. In response to the business justification of Respondent USEC for the layoff and other actions taken against Mr. Jones by USEC, I find that the reasons were not established by clear and convincing evidence; that he would not have otherwise received the low rating and consequent layoff , and, therefore, his layoff; that the reasons stated constituted a pretext for the real reason that he was terminated, his protected activity, and that Respondent has, failed to "demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."

As a consequence, Complainant has established, by a preponderance of the evidence that his layoff was directly and intentionally motivated, at least in part, by his health and safety complaints; that they legitimately involved the safety and health of USEC in handling and moving nuclear products, by-products, with mobile industrial equipment, including powered industrial trucks, cranes, forklifts, cylinder haulers, and the like and that this directly involved practices made unlawful by the Energy Reorganization Act, and that they contributed to his termination by layoff, and other adverse actions more particularly set forth herein.

REMEDIES :

Having found that the complaint of Mr. Jones has merit in that USEC has violated the employee protective provisions of the ERA through his layoff, I must consider the remedies that must be ordered to rectify the violations, and make Mr. Jones whole for them. This "make whole" remedy must include appropriate reinstatement and back pay, benefits. Compensatory damages and orders to restore his reputation may also be considered as a recommended order. 29 C.F.R. §§24.7(c)(1). Back pay and benefit considerations may include lost vacation and other chargeable pay remedies such as compensation time, sick time, and other time benefits, as well as lost pension and health benefit losses and contributions to those plans for hours that would otherwise have been worked.

The purpose of reinstatement and a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in, if he had not been discriminated against. Back pay awards should, therefore, be based on all of the earnings the employee would have received but for the discrimination. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). The Sixth Circuit has held that §§5851 (b)(2)(B) of the ERA allows compensatory damages in addition to abatement of discrimination, reinstatement with back

pay, and restoration of all job related entitlements such as retirement benefits. *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), on remand at *Deford v. Tennessee Valley Authority*, 81-ERA1 (Sec'y Aug. 16, 1984). Medical expenses and damages for injury to reputation may also be awarded. *Ibid.*

Mr. Jones is also entitled to prejudgement interest on the back pay, and lost litigation time pay in accordance with prevailing case law. The fact that the ERA, or the other the environmental Acts, do not expressly provide for interest on back pay awards does not preclude it. Backpay awards are designed to make whole the employee who has suffered economic loss as a result of an employer's illegal discrimination. The assessment of prejudgment interest is also necessary to achieve this end. According to the Administrative Review Board in *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000), "[t]he usual interest rate employed on back pay awards under ... whistleblower provisions is the interest rate for underpayment of federal taxes, set forth at 26 U.S.C. §§ 6621(a)(2) (short-term Federal rate plus three percentage points)." The ARB has held that in whistleblower cases, it awards the same rate of interest on back pay awards, both pre- and post-judgment that is, compounded and posted quarterly. The Board in *Doyle* stated: "In light of the remedial nature of the ERA's employee protection provision and the 'make whole' goal of back pay, we hold that the prejudgment interest on back pay ordinarily shall be compound interest. Our reasoning applies equally to back pay awards under analogous employee protection provisions of the other federal statutes under which we issue administratively final decisions under the CAA, CERCLA, FWPCA, SDWA, SWDA, STAA and TSCA[27]. Absent any unusual circumstance, we will award compound interest on back pay in cases arising under all of these ... provisions." Under *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996), interest does not accrue on a compensatory damages award.

Prejudgment interest on back wages recovered in litigation before the DOL is calculated, in accordance with 29 C.F.R. §§ 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. §§ 6621. The employer is not to be relieved of interest on a back pay award because of time elapsed during adjudication of the complaint. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991); citing *Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990).

As part of the "make whole" remedy, respondent may also be ordered to post notices containing the following order, and to submit such notices as are ordered by the undersigned to affected third parties. In *McMahan v. California Water Quality Control Board, San Diego*

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[27] The Clean Air Act ["CAA"], 42 U.S.C. Section 7622 (a); the Comprehensive Environmental Response, Compensation and Liability Act ["CERCLA"], 42 U.S.C. Section 9610; the Federal Water Pollution Prevention and Control Act ["FWPCA"], 33 U.S.C. Section 1367; the Safe Drinking Water Act, ["SDWA"], or Public Health Service Act ["PHSA"], 42 U.S.C. Section 300j-9; the Solid Waste Disposal Act ["SWDA"], 42 U.S.C. Section 6971; the Surface Transportation Assistance Act, 49 U.S.C. Section 31105; and the Toxic Substances Control Act ["TSCA"], 15 U.S.C. Section 2622.

*Region***,** 90-WPC-1 (Sec'y July 16, 1993), the respondent was ordered to expunge from its records all memoranda or reference to a reprimand which had been found to be in violation of the FWPCA's whistleblower provision, to post written notice for 30 days advising its employees that the reprimand had been expunged and that he has been reinstated to his former position, and to pay complainant's costs and expenses. See also *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000) In addition, ARB affirmed the ALJ's order requiring respondent to post the decision at its own facilities in *Doyle*.

In *Smith v. Esicorp, Inc.*, 1993-ERA-16 (ARB Aug. 27, 1998), respondent was ordered to post the ARB's decision for a period of 90 days, as well as an earlier Secretary of Labor remand decision. It was to be posted in a lunchroom and another prominent place accessible to employees at the nuclear facility where complainant was subjected to harassment. The ARB stated that "[t]he purpose of posting is to provide notice that whistleblowers will be protected if they are discriminated against. If [respondent] is unable to secure posting . . . at the . . . nuclear plant, notification may be accomplished by publishing the two documents in a local general circulation newspaper."

According to the Administrative Review Board, where a violation of the ERA is found, compensatory damages may be awarded in addition to back pay, for emotional pain and suffering, mental anguish, embarrassment, and humiliation. 42 U.S.C. §§ 5851(b)(2)(B); 29 C.F.R. §§ 24.6(b)(2). A complainant is not required to include an explanation of the damages sought in his whistleblower complaint. See, *Sawyers v. Baldwin Union Free School District*, 85-TSC-1 (Sec'y Oct. 5, 1988), slip op. at 3-4. *Blackburn v. Metric Constructors, Inc.***,** 86-ERA-4 (Sec'y Aug. 16, 1993). The award may be supported by the circumstances and testimony about physical or mental consequences of retaliatory action, but the testimony of medical experts is not necessary;. *Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993). The Sixth Circuit has enforced the concept of damages for injury to reputation. *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), on remand at *Deford v. Tennessee Valley Authority*, 81-ERA1 (Sec'y Aug. 16, 1984), stating that medical expenses as well as damages for injury to reputation may also be awarded. However, *DeFord* also stands for the proposition tha sufficient substantial evidence must be presented to justify the award. In the present case, there is some evidence to support compensatory damages, but the lack of supporting evidence, either by documentation or other testimony tends to limit the amount that may be awarded in this case.

In *McCuistion v. TVA*, 89-ERA-6 (Sec'y Nov. 13, 1991), the Secretary Of Labor cited favorably a series of decisions which upheld compensatory damages for the following types of harm: symptoms such as insomnia, nightmares, fatigue and appetite loss, an employee's wife suffering from tremendous emotional strain, other marital problems, deterioration in health, an exacerbation of pre-existing hypertension, and feelings of remorse that the education of the employee's daughter was disrupted. In *Mitchell v. APS/ANPP*, the Administrative Law Judge awarded $50,000, in part, because respondent's hostile work environment caused the complainant to become upset and nervous, and suffer from post- traumatic stress disorder. 91-ERA-9 (ALJ July 2, 1992).

Here, I find three important factors present: (1) The totality of Mr. Jones training activities after his transfer to that department was such that the provisions of the ERA were invoked from the beginning of his assignment to the end of it, due to his continuous reminders' of the violations of OSHA rules and regulations that were involved in not providing the necessary training on MIE/PITs to construct training modules in that area; and, (2) USEC management had an intent to promote harm to Mr. Jones, in the deliberate use of the IRIF evaluation system to bring about his layoff in response to the health and safety matters that he had raised, and I have specifically rejected USEC management's explanations therefore. (3) As a third consideration, Mr. Jones has testified to the various effects that the employer's unlawful conduct has wrought, which I credit in its entirety, as follows:

Mr. Jones testified that when he was laid off, he was off from work from July 5th to October 9th, 2000, or three months, and that, when he was finally hired by his employer at the time of the hearing, Lan Associates, he still worked on the USEC Gaseous Diffusion Plant grounds doing subcontract work for the Weskem company, a Department of Energy (DOE) contractor for Bechtel Jacobs. His annual USEC salary was $52,000.00, and was $49,500.00 for Lan. Lan has no pension fund, as did USEC. In addition, Mr. Jones received normal severance pay, rather than enhanced severance pay. He received the normal for Kentucky maximum unemployment compensation benefits. In addition he testified that he was, "hurt, disappointed, devastated, especially after seeing ... I had worked there for 12 years and for the first 11 I was a good employee, and then, all of a sudden, I was ... rated as just a really, really bad employee ... that will tend to depress you."

In addition, it has been established that:

1. Mr. Jones has lost the honor, prestige and reputation of the training position that he had earned and held before the transfer, and is now entitled to reinstatement, back pay, lost pension contributions and benefits, and other lost pay, as well as a make whole remedy.

2. Mr. Jones was out of work for a total of three months, for which he is entitled to back pay in the amount of $13,000.00 , plus the difference between he regular pay at USEC of $52,000.00, minus that of base pay at Lan, in the amount of $49,500.00, or $2,500.00 per year, or $208.332 per month, through the date of the this recommended decision and order, which is $5,000.00 on or about July 6, 2002, and continuing thereafter on a monthly basis, as more accurately calculated in accordance with actual USEC payroll records, plus interest and lost benefits related thereto, if any, minus severance pay and unemployment compensation benefits, unless otherwise provided by state law, through the date of the final order in this matter.

3. It may also be inferred from his presence at the hearing and his testimony that Mr. Jones has lost at least 2 days plus time devoted to the taking of depositions and

preparation for this hearing, and of either vacation pay benefits, leave without pay,

compensatory time or other pay for lost time in preparation for the hearing, for which I find that he is entitled to an award of damages, and do so order at the rate at USEC.

4. At the election of Mr. Jones, that USEC pay the lost pension fund contributions and benefits to him in the following manner, either: (1) payment of direct contribution to the pension fund for his time lost at USEC due to his termination at the rates in effect throughout the period from the date of his layoff to the date of this final order; or (2) payments of direct compensation in lieu of those payments as follows: (a) the amount of the periodic contribution as set forth above, plus (b) a prorated calculation of the earnings of the pension fund times the amount that would have been contributed on his behalf to his USEC pension fund, to be paid directly to him for the purpose of investing in the his own retirement fund, if any, or to be utilized at his own discretion, if he has no other such account.

5. Although Mr. Jones did not specifically request compensatory damages, it is my opinion that it may be inferred from this testimony that he was, "hurt, disappointed, devastated, especially after seeing ... I had worked there for 12 years and for the first 11 I was a good employee, and then, all of a sudden, I was ... rated as just a really, really bad employee ... that will tend to depress you", and I so find. I have observed his forthrightness, his consistency, and demeanor throughout the trial, and I credit his testimony on these points, and therefore conclude that this condition has added to stress and depression over and above the loss of pay and benefits, and is, therefore, entitled to compensatory damages under the ERA, for the mental consequences of USEC's retaliatory action, including emotional pain and suffering, mental anguish, embarrassment, and humiliation, which I credit. Since his departure from all work was brief and did have some lasting effects, but he did not offer other supporting or descriptive evidence, either from medical, psychiatric or lay sources, and noting that medical evidence is not absolutely necessary to award compensatory damages, I find that he is entitled to an award of compensatory damages in an amount of not less than $10,000.00.

6. I also direct the USEC to notify all other agencies of the the United States Government and subcontractors for those agencies with whom the USEC has been involved at the Paducah Gaseous Diffusion Plant, and with whom Mr. Jones had business dealings on behalf of USEC, or to whom Mr. Jones submitted applications for employment, by submitting a letter enclosing the attached notice to the departments of such agencies or subcontractors with whom USEC has done business through Mr. Jones.

7. Since Mr. Jones is entitled to his attorneys' fees and costs of litigation, I direct the complainant's attorneys to file an application therefore, postmarked within thirty days of the date of this decision and order and preliminary order. Requests for

attorney travel and expenses must be specifically documented and briefed, to which respondent will be permitted a memorandum in response to be postmarked on or before 20 days from receipt of complainant's brief. A reply brief from complainant may be postmarked within 10 days of receipt of that response.

8. In addition to the above, upon finding a violation of the ERA, 29 C.F.R. §§24.7(c)(2) requires that, in the event that I find that the complaint has merit and contains the relief prescribed in 29 C.F.R. §§24.7(c)(1), then I must issue a preliminary order providing all of the relief set forth in that paragraph, with the exception of compensatory damages. This preliminary order shall constitute the preliminary order of the Secretary of Labor, and shall be effective immediately whether or not a petition for review is filed with the Administrative Review Board. The compensatory damage award shall not be effective until the final decision is issued by the Administrative Review Board. The ERA does not permit exemplary damages. Under this preliminary order, the implementation of the "make whole" remedies are mandated. These include the reinstatement of Mr. Jones to his former position as trainer, in particular as trainer for the mechanical industrial equipment and powered industrial trucks (MIE/PITs) for the Paducah Plant together with payment of his lost back pay, and benefits, including pension contributions as set forth above, effective immediately upon issuance of this preliminary order. It also includes posting of the order, and the communication of it together with the cover letter set forth above to all U.S. Government agencies and subcontractors with whom Mr. Jones was involved on at the Plant or in his search for employment.

9. I direct that Respondent, USEC post a the attached notice on all of its employee bulletin boards, or in all of its public places and points of ingress and egress of its employees at its Paducah Gaseous Diffusion Plant for a period of not less than 90 days from the date of posting.

Therefore, the following recommended order, to be effective immediately if no petition for review is filed, or upon an applicable ruling by the Administrative Review Board if review is sought under the provisions of 29 C.F.R. §§24.1(c)(1), and the additional preliminary order, to be effective immediately whether or not a petition for review is filed with the Board under the provisions of 29 C.F.R. §§24.1(c)(2), are hereby issued:

RECOMMENDED ORDER

Having found that Mr. Jones' complaint has merit in that USEC has violated the employee protective provisions of the the Energy Reorganization Act, 42 U.S.C. Section 5851, and the implementing regulations appearing at 29 C.F.R. Part 24.1, and having considered the remedies and damages that must be ordered to rectify those violations to make Mr. Jones whole and to compensate him for them within the provisions of the seven Acts, therefore,

IT IS ORDERED that,

1. Respondent USEC cease and desist all conduct involving the above determined interference, restraint and coercion, and all discriminatory conduct toward Complainant Douglas Jones for his protected activity under the ERA;

2. Mr. Jones be immediately reinstated to his former position as site coordinator at USEC's Paducah Gaseous Diffusion Plant ;

3. Mr. Jones receive full back pay for all time lost due to his layoff, plus benefits and pension contributions, to include, $13,000.00 in back pay for the three months that he was totally unemployed due to the layoff, plus $5,000.00 difference in pay for 24 month a from the time of his layoff in July 2000 through June 2002, plus monthly payments thereafter at the rate of $208.33 per month as otherwise ordinarily calculated and paid by USEC until it has complied with all of the provisions of this decision and order plus pension fund benefits and other benefits, if any;

4. At the election of Mr. Jones, that USEC pay the lost pension fund contributions and benefits in the following manner, either: (1) payment of direct contribution to the pension fund for his time lost at USEC due to his termination at the rates in effect throughout the period from the date of his layoff to the date of this final order; or (2) payments of direct compensation in lieu of those payments as follows: (a) the amount of the periodic contribution as set forth above, plus (b) a prorated calculation of the earnings of the pension fund times the amount that would have been contributed on his behalf to his USEC pension fund, to be paid directly to him for the purpose of investing in the his own retirement fund, if any, or to be utilized at his own discretion, if he has no other such account.

5. Mr. Jones receive 2 days lost pay, plus any other time lost, due to the various phases of the litigation, including pay for lost time due to such matters as attending depositions and preparation for this hearing;

6. Mr. Jones be paid the amount of $10,000.00 in compensatory damages.

7. Where applicable, that Mr. Jones receive interest on all amounts set forth herein from the dates of his suspension and his transfer through the dates that the suspension and transfer are determined to have ended;

8. Mr. Jones' personnel file be expunged of all adverse personnel actions and comments regarding allegations against him made as a result of his transfer to the training department in 1999 and his layoff therefrom in July of 2000;

9. Respondent, USEC, post a notice consisting of copies of the attached order and preliminary order on all employee bulletin boards in its Paducah Gaseous Diffusion

Plant, for a minimum of 90 days;

10. A letter be addressed to the appropriate offices of USEC and all other governmental agencies and subcontractors Mr. Jones has been cleared of all allegations against him made as a result of his transfer to the training department in 1999, and his layoff from USEC in July of 2000, and that the letter include a copy of this order and preliminary order;

11. Mr. Jones is awarded his attorneys fees and costs of litigation, concerning which I direct the complainant's attorneys to file an application therefore, postmarked within thirty days of the date of this decision and order and preliminary order. Requests for attorney travel and expenses must be specifically documented and briefed, to which respondent will be permitted a memorandum in response to be postmarked on or before 20 days from receipt of complainant's brief. A reply brief from complainant may be postmarked within 10 days of receipt of that response.

All other outstanding motions which have not been directly addressed in this recommended decision and order, are denied.

IT IS SO ORDERED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE

The Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief, Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).